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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD,
Solicitor General,

LEONARD W. WEINGLASS,
Assistant Attorney General,

GREGORY A. HOVENKAMP,
ROBERT B. HUMMEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530

ROBERT W. GERNANT,
General Counsel,

THOMAS KELLOGG,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court (App. A, *infra*, pp. 9–14) is not yet reported. The report of the Interstate Commerce Commission (App. C, *infra*, pp. 22–45) is published at 333 I.C.C. 720.

JURISDICTION

The judgment of the three-judge court (App. A, *infra*) was entered on March 19, 1970. Notices of appeal (App. B, *infra*) were filed by the Interstate Commerce Commission and the United States on May 14, 1970, and May 18, 1970, respectively. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162.

398-035—70——1

QUESTION PRESENTED

Whether the district court improperly required the discontinuance of one train to await the completion of all proceedings relating to another train without even considering the merits of the Commission's decision, which had concluded that the first train could properly be discontinued even if the second were not.

STATUTE INVOLVED

Section 13a(1) of the Interstate Commerce Act, as added, 72 Stat. 571, 49 U.S.C. 13a(1), provides:

> A carrier or carriers subject to this part; if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws

or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change un-

less notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

STATEMENT

In September 1968 the Interstate Commerce Commission authorized the Louisville and Nashville Railroad Company (L&N) to discontinue a train known as the "Hummingbird" which operated between Cincinnati and New Orleans. *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (App. C, *infra*). A suit seeking review of this decision was first dismissed by the lower court on the ground that the Commission decision was not reviewable, a judgment subsequently reversed by this Court. *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106, reversed *sub nom., City of Chicago* v. *United States*, 396 U.S. 162. The trains have not operated since January 1969.[1]

After this Court's reversal, plaintiffs below filed a motion seeking remand to the Commission on the ground that the "Hummingbird" was closely related to another train discontinuance (the "Georgian") where defective notice had allegedly been given. See the

[1] An earlier restraining order lapsed in January 1969, when the lower court dismissed the action. Subsequent efforts to revive that order, before the lower court and this Court (Mr. Justice Marshall) were unsuccessful.

jurisdictional statement we are filing contemporaneously herewith in *United States, et al.* v. *City of Chicago, et al.*, to review the "Georgian" case. On February 5, 1970, the lower court summarily remanded both the "Hummingbird" and "Georgian" cases to the Commission. On March 19, 1970, after the Government and L&N had filed motions for rehearing but before any briefing or argumentation on the merits of the appeal,[2] the court consolidated the two cases, vacated its prior order, and entered a new judgment remanding the instant case to the Commission for further proceedings in conjunction with the "Georgian" case, which it was remanding on the defective notice ground.[3]

The basis of the instant remand, while not free from doubt, appears to have been the district court's belief that the Commission in its "Hummingbird" proceedings had not adequately considered the impact of a possible court victory by appellees in their appeal from the "Georgian" discontinuance. Appellees in their

[2] A hearing on various motions in the Georgian and Hummingbird cases was held before the lower court on November 4, 1968 (see transcript in Nos. 101 and 102, O.T., 1969). This hearing dealt almost entirely with a railroad motion to dismiss (culminating in *City of Chicago* v. *United States*, 396 U.S. 162), and plaintiffs' motion for summary judgment based on lack of notice as to the Georgian. The merits of neither proceeding were before the court. This was recognized by counsel for plaintiffs in arguing his Georgian notice motion: "All that is before you today is the jurisdictional issue. We are not here on the merits of this case today." (Tr. 26).

[3] The lower court also entered orders requiring restoration of the "Hummingbird" by April 3, 1970, pending further Commission proceedings. The restoration was subsequently stayed by this Court on April 3, 1970, pending appeal by L&N.

Memorandum in Support of Motion on Mandate mentioned "the interdependence of C & EI's segment of the 'Georgian' trains, with the 'Hummingbird' trains * * *" in arguing for a remand of the "Hummingbird case" (Memorandum, p. 3). The court in remanding for a consolidated proceeding tersely stated that "* * * such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached" (App. A, *infra*, p. 13).

DISCUSSION

The district court's apparent reason for vacating the Commission's order in this case was its conclusion that the case should be consolidated and considered together with the appeal involving the "Georgian" trains. We consider this conclusion error for two reasons (apart from the error in the underlying "Georgian" case): first, it constituted action on the merits of the appeal, and thus ought not to have been taken in advance of briefing and oral argument; second, it is inconsistent with the Section 13a(1) requirement of *expeditious* proceedings to make discontinuance of the "Hummingbird" await completion of all proceedings relative to the "Georgian" where, as here, the Commission had already considered the relationship between the two trains and determined that, even if the one were continued, the other would continue to suffer losses warranting discontinuance (App. C, *infra*, p. 31).

These errors, we concede, may not in themselves have the general importance warranting plenary review in this Court, since their effect beyond the pe-

rimeters of this case is open to doubt. However, the district court's order is associated with and dependent upon its disposition of *City of Chicago, supra,* in which we are filing a Jurisdictional Statement that does, we believe, set forth contentions warranting plenary review in this Court. In the event the district court's judgment is reversed in those proceedings, summary disposition here would be appropriate.

CONCLUSION

For the foregoing reasons, action on this Jurisdictional Statement should be postponed pending final action on the Jurisdictional Statement in *United States v. City of Chicago,* filed contemporaneously herewith.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
ROBERT B. NICHOLSON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

JEROME NELSON,
Interstate Commerce Commission.

JULY 1970.

APPENDIX A

United States District Court for the Northern District of Illinois, Eastern Division

No. 68 C 956

CITY OF CHICAGO, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970, entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) mo-

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tion of defendant Chicago & Eastern Illinois Railroad Company ("C&EI") for rehearing or amendment of said order of February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion, and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that the L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> ". . . petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order."' (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

> "Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1–2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N. The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

> "In *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed per curiam 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route . . .*" (Emphasis supplied)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the 'Hummingbird'' trains pending the Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate operation of the "Hummingbird'' trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to the I.C.C. and consoli-

dated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

(S) WIN G. KNOCH,
Circuit Judge.

(S) J. SAM PERRY,
District Judge.

(S) EDWIN A. ROBSON,
District Judge.

Dated: CHICAGO, ILLINOIS, *March 19, 1970.*

APPENDIX B

In the United States District Court for the Northern District of Illinois Eastern Division

Civil Action No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

I.

Notice is hereby given that the United States of America, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 25047.

II.

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its

transmission to the Clerk of the Supreme Court of the United States.

RICHARD W. MCLAREN,
Assistant Attorney General.
THOMAS A. FORAN,
United States Attorney,
Chicago, Illinois 60604.
JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.
Attorneys for the United States of America.

PROOF OF SERVICE

I, John H. D. Wigger, one of the attorneys for defendant United States of America, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendell W. Wright, Esq., and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doolittle, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding

Avenue, Terre Haute, Indiana 47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission; State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 Southern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn, Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first-class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies

in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant Interstate Commerce Commission by mailing copies with first-class postage prepaid to Robert W. Ginnane, General Counsel, and Jerome Nelson, Attorney, Interstate Commerce Commission, Washington, D.C. 20423.

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

(Filed, May 18, 1970.)

In The United States District Court For The Northern District of Illinois Eastern Division

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Civil Action, No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE INTERSTATE COMMERCE COMMISSION

I.

Notice is hereby given that the Interstate Commerce

Commission, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 25047.

II.

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

PROOF OF SERVICE

I, Jerome Nelson, one of the attorneys for defendant Interstate Commerce Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 12th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendell W. Wright, Esq. and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doo-

little, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding Avenue, Terre Haute, Indiana 47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission, State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 Southern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn,

Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant United States of America by mailing copies with first-class postage prepaid to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; to the Honorable Thomas A. Foran, United States Attorney, Chicago, Illinois 60604; to the Honorable Richard W. McLaren, Assistant Attorney General of the United States and the Honorable John H. D. Wigger, Attorney, Department of Justice, Washington, D.C. 20530.

JEROME NELSON,
Attorney,
Interstate Commerce Commission.

[Filed May 14, 1970.]

APPENDIX C

FINANCE DOCKET NO. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Decided September 3, 1968

Upon investigation, found that the continuance of operation by the Louisville and Nashville Railroad Company of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by public convenience and necessity and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

Clifford T. Coomes, Charles B. Arendall, Jr., Thomas S. Lawson, Jr., James E. Simpson, David M. Keeble, and *Robert T. McConaughy* for the Louisville and Nashville Railroad Company.

Weldon A. Cousins, Langdon D. Bell, Nat K. Knight, Bennett E. Smith, Robert A. Jones, Eugene W. Ward, James Kenneth Atkins, and *Chester L. Rigsby* for regulatory agencies of the States of Louisiana, Mississippi, Alabama, Tennessee, Kentucky, and Ohio, protestants.

Louis A. Schwartz, Lawrence F. Daspit, Horace Perry, William A. Thompson, Robert E. Kendrick, Rom McGrath, Raymond F. Simon, and *Bernard Rane* for protestants.

S. F. Walker, F. T. Edwards, Olin B. Brooks, Leslie Stifflemire, P. A. Young, Clifford H. Rex, Joe Hester, Henry E. Risner, John B. Mullins, Jr., J. W. Faust, J. G. Griffin, Alex E. Little, Harry T. Smith, W. R. Selby, A. L. Shepherd, and *Robert C. Tyler* for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND DEASON

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, the Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the act, filed a notice and statement on April 3, 1968, in which it proposed to discontinue, effective May 7, 1968, the operation of its passenger trains Nos. 6 and 7 operating between New Orleans, La., and Cincinnati, Ohio, a distance of 927 miles. Copies of the notice were served and posted in the manner prescribed by section 13a(1) of the act and related rules and regulations.

Upon receipt of numerous petitions and letters of protest, an investigation of the proposed discontinuance of service was instituted by our order dated April 24, 1968, which required continued operation of the trains for a period not exceeding 4 months beyond the date when the discontinuance would have become effective. Because of the statutory limitation upon the time available for investigation and decision, the order provided for the omission of a report and recommended order by the hearing examiner and for certification of the record to us for initial decision. Hearings were held at New Orleans, La., Mobile, Montgomery, and Birmingham, Ala., Nashville, Tenn.,

Louisville, Ky., and Cincinnati, Ohio. Briefs have been filed.

The trains.—Train No. 6 operates northbound daily from New Orleans to Cincinnati departing New Orleans 8:15 a.m. and arriving Cincinnati 8:10 a.m. the next morning. Train No. 7 operates southbound daily from Cincinnati departing Cincinnati 7:40 p.m. and arriving New Orleans 8:10 p.m. the next evening. The schedule of the trains, the points served, and their populations are set forth in appendix A.

Train consists and crews.—The regular consist of northbound train No. 6 is one double-unit diesel locomotive, one coach, one sleeping car, and one baggage-express car, New Orleans to Cincinnati, daily; one dining car, New Orleans to Nashville, daily; one dormitory car, Montgomery to Nashville, daily; one coach, Montgomery to Louisville, 3 days a week; from one to four express cars, Nashville to Cincinnati, 4 days a week; one storage-mail car, Louisville to Cincinnati, 4 days a week; and one mail-express car, Louisville to Cincinnati, 3 days a week.

The regular consist of southbound train No. 7 is one double-unit diesel locomotive, one coach, and one sleeping car, Cincinnati to New Orleans, daily; one or more express cars, Cincinnati to Louisville, at irregular intervals; one storage-mail car, Cincinnati to Nashville, daily; one baggage-mail car, Cincinnati to Montgomery, daily; one mail-express car, Louisville to Nashville, 6 days a week; one express car Louisville to Nashville, 3 days a week; one coach, Louisville to Montgomery, 3 days a week; one dining car, Nashville to New Orleans, daily; one dormitory car, Nashville to Montgomery, daily; one storage-mail car, Nashville to New Orleans, 5 days a week; one storage-mail car, one baggage-mail car, and one coach, Montgomery to New Orleans, daily.

The equipment is described as modern and well maintained and the passenger cars are the newest owned by the carrier. The locomotive equipment would be retired and the car equipment transferred to other trains as replacements of older equipment.

Train No. 6 employs 6 engineers, 6 firemen, 5 conductors, 5 flagmen, 2 baggagemen, 2 coach attendants, 3 dining car employees and a pullman porter for a total of 30 crew members. Train No. 7 employs the same number of employees in each of the same categories except 1 less conductor for a total of 29 crew members.

Other persons required for the operation of the trains include station and terminal employees who sell tickets, operators and dispatchers charged with actual operation of the trains, yard-crews who form the trains and work on train equipment, car department employees who inspect, maintain, and clean the car equipment, and mechanical employees who maintain the required motor power.

One position in each pullman car would be eliminated; the personnel involved are not employees of the carrier.

Following the proposed discontinuance, the on-train crews would be employed in other services; they all maintain freight seniority and could be used in freight related positions. Those with insufficient seniority might be assigned to extra boards.

Use of passenger service.—In the respective periods of 1966, 1967, and 1968 (the last, annualized on the basis of data for February 1 to April 30, 1968), the passenger miles of the trains were 52,848,271, 48,668,491, and 22,035,336. In the respective periods of November and December 1967, January, February, March, and April 1968, the average number of passengers per train-mile on train No. 6 was 47, 82.6,

54.4, 30.4, 36.4, and 35.7. During the same periods the average number of passengers per train-mile on train No. 7 was 43.3, 85.4, 50.7, 30.9, 31, and 34.3.

Appendix B reflects the daily average "on" and "off" counts at all stations between New Orleans and Cincinnati for a 6-month period November 1, 1967 to April 30, 1968. The symbols (OC) and (L&N byd) refer to passengers transferring from other railroads and passengers transferring to other L&N trains. On train No. 6, the only intermediate points having an average of 8 or more passengers per day "on" or "off" were Pascagoula (10), Mobile (15), Montgomery (24), Birmingham (25), Decatur (8), Nashville (32), and Louisville (12). On train No. 7 the only intermediate points having a daily average of 7 or more were Louisville (20), Bowling Green (15), Nashville (30), Decatur (7), Birmingham (22), Montgomery (20), and Mobile (17).

Alternate transportation.—In addition to the trains proposed for discontinuance, L&N operates daily trains Nos. 8 and 9 (the Pan American) between New Orleans and Cincinnati, serving the same intermediate points, except Rigolets, La., a conditional stop on train No. 7. Train No. 8 departs New Orleans at 8:45 p.m., as compared with train No. 6's morning departure, and arrives Cincinnati at 9:30 p.m., the following evening. Train No. 9 departs Cincinnati 9:15 a.m., as compared with train No. 7's evening departure, and arrives New Orleans 7:55 a.m., the following morning. L&N also operates trains Nos. 15 and 16 (the South Wind) every other day, between Louisville and Montgomery, serving the same intermediate points as its other four trains. In connection with the Penn Central Railroad and the Seaboard Coast Line Railroad, the South Wind provides through service between Chicago, Ill., and certain Florida points, in-

cluding Miami and St. Petersburg. Through service would remain between New Orleans and Atlanta, Ga., by change of schedule by the Atlanta and West Point Railroad (A&WP) between Atlanta and Montgomery, the latter an interchange point with the L&N, whereby A&WP would connect with L&N train No. 9 rather than with L&N No. 7 as at present.

All L&N stations here involved, except Rigolets, have direct daily bus service between New Orleans and Cincinnati. There are as many as 21 bus schedules between the various points, depending upon the populations.

Daily scheduled airline service is available between Cincinnati, Louisville, Bowling Green, Nashville, Birmingham, Montgomery, Mobile, Pascagoula, Gulfport, Biloxi, and New Orleans.

Official highway maps of the States involved herein indicate numerous combinations of Federal highways including several segments of the interstate system between New Orleans and Cincinnati and the principal intermediate points served by the trains.

Financial data.—The carrier's balance sheet as of March 31, 1968, shows assets of $1,003 million, including current assets of $97.4 million, special funds $4.3 million, investments $34.8 million, total properties less reserves for depreciation and amortization $857.3 million, and other assets and deferred charges $9.1 million. Liabilities were: Current $53.6 million; long-term debt, due within 1 year, $27.7 million; long-term debt, due after 1 year, $407.8 million; reserves $5.8 million; other liabilities and deferred credits $16.6 million; capital stock $123.9 million; capital surplus $22.1 million; and retained income unappropriated $345.4 million. L&N's income statements for the years 1966, 1967, and the first 3 months of 1968, show, respectively, railway operating revenues of $292.2 million, $285.3 mil-

lion, and $73.5 million; net railway operating income $38.2 million, $31.4 million, and $6.6 million; net income after fixed charges and other deductions $28.5 million, $19.9 million, and $4.9 million.

The carrier's exhibits and testimony, as revised, depicting revenues, expenses, and out-of-pocket losses pertaining to the operation of the trains indicate net losses in 1966, 1967, and the first 4 months of 1968, of $9,318, $505,361, and $309,461, respectively. The estimated net loss for 1968, based on the month of April 1968, is $909,667. Net annual savings to the carrier, systemwise, upon discontinuance of the trains, are estimated to be $1,610,473. Appendix C reflects the actual revenues and expenses for the year 1967 and the first 4 months of 1968 in the first and second columns. The third column reflects the revenues and expenses for the year 1968 based upon the operating results for the month of April 1968. Column four reflects an estimate of the revenues that would be retained on other L&N trains and the added expenses of handling the traffic on other trains. Column five is an estimate of revenues that would be lost and the expenses to be saved by handling the traffic on other trains should the discontinuance of trains Nos. 6 and 7 be approved.

The revenues and costs, as set forth in appendix C, were computed by the carrier in accordance with generally accepted methods previously approved by the Commission as appropriate in train discontinuance cases and are not under dispute.

The operating expenses for 1966, 1967, the first 4 months of 1968, and the projection for the year 1968 were shown on an out-of-pocket basis. Wages of trainerews and enginecrews are the actual wages paid the crews, increased for the appropriate payroll taxes, meals, lodging, vacation, holiday, and health and welfare allowances. Locomotive fuel, water, lubricants and

other supplies, locomotive depreciation, and personal injury and livestock damage, are on system averages with appropriate allocations to these trains according to the actual units involved. Dining expenses is the actual cost incurred and pullman deficits are the amounts billed by the Pullman Company.

Locomotive repairs and enginehouse expenses are based on system average unit costs applied to the number of units involved in these trains, decreased by 21 percent for overhead costs which include such items as labor costs and maintenance of facilities which would remain constant even though trains Nos. 6 and 7 were discontinued.

Car repairs and train supplies and expenses are similarly determined and subjected to a 21-percent decrease for overhead costs and elimination of the costs for deadhead cars on trains Nos. 6 and 7. Car depreciation and cost for rental of passenger cars were adjusted to eliminate deadhead equipment.

The joint terminal expenses shown to be avoidable as a result of the discontinuance were computed in the manner approved by the Commission in *Chicago, R.I. & P.R. Co. Discontinuance of Trains,* 328 I.C.C. 278, 286. They include only the amount by which the carrier's share of the total expenses would be diminished by virtue of its lesser use of the terminals. The costs shown as savable do not include amounts attributable to deadhead equipment carried on trains Nos. 6 and 7 in and out of the terminals.

Evidence in opposition.—Thirty-nine public witnesses appeard at hearings in opposition to the discontinuance of the trains of whom 6 appeared at New Orleans, 9 at Montgomery, 16 at Birmingham, 6 at Nashville, and 2 at Louisville. No public witnesses appeared at Mobile or Cincinnati.

Among those expressing opposition were represent-

atives of United States Congressmen, a representative of the Governor of Alabama, a State legislator, members and representatives of the Public Service Commissions of Louisiana, Mississippi, Alabama, and Tennessee, a member of the Kentucky Railroad Commission, mayors, city and county officials, a representative of a college, a mortician, carrier employees, a pullman porter, and members of the public. Of the total witnesses, 14 were past and prospective patrons of the trains.

Public officials opposed the discontinuance of the trains on the stated ground that the economy and the industrial growth in the area is dependent upon continued service by all means of transportation, and particularly rail passenger service. They were also concerned with the general disappearance of passenger trains through discontinuances and the likelihood that all rail passenger service may become extinct. They, regular passengers, and others contend that alternate transportation services are not adequate.

Generally the passenger witnesses testified that at times there were equipment failures, that on time performances were poor, that overcrowding, particularly on weekends and holidays, had occurred, and that the employees were not as courteous as those of other common carriers. Criticism was also directed to a lack of advertising by the carrier. On the other hand, several of the patrons praised the carrier as being first class as compared with other railroads. All of such witnesses were desirous of having the trains for their future use and most preferred rail transportation to bus travel and some indicated their fear of air travel.

Discussion and Conclusions

Among factors to be considered in proceedings under section 13a (1) of the act to ascertain whether

operation of the passenger trains is required for the public convenience and necessity and will not unduly burden interstate commerce are the population served, the effect on the communities on their route, the extent of the use made by the public of the service sought to be discontinued, alternate transportation service available in the area, the costs incurred and financial losses sustained by the carrier in providing the service under consideration, and the carrier's financial condition. No one of such factors by itself is conclusive or controlling. The burden imposed upon the carrier and upon interstate commerce must be weighed against the need for the service. It is possible that the need for the service under certain circumstances may be so great as to warrant its continuation even at a loss to the carrier. This could arise where the loss of the service would inflict serious injury on the communities, while continuance of the service would impose a relatively slight financial burden on the carrier. The facts in this proceeding do not disclose such an overriding need for the continuance of the involved trains.

L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at Nashville, via intermediate L&N trains Nos. 5 and 10. The C&EI trains were discontinued February 1, 1968, *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville*, 331 I.C.C. 447.

If the carrier were required to operate the subject trains for another year, it would suffer out-of-pocket losses in excess of $900,000 (computed on the basis of

1968 costs and revenues). Nothing in the record indicates that the deficit could be abated in future years. In addition to the loss of connecting passengers, railway post office cars have been eliminated, reducing mail revenues, and on April 1, 1968, railway express (from one to four cars daily) was diverted to truck over the highway.

The full burden of the trains can be better visualized by considering the total economies attainable upon their discontinuance. As shown in appendix C, by retaining a portion of their traffic through diversion to other L&N trains (estimated to produce revenues of $939,500) and incurring thereon costs estimated at $238,700, the carrier could avoid more than $2.3 million of its present costs and thus effect economies in the range of $1.6 million per year. This brings us face to face with the question of whether the public's need for these trains is so great that the nation's private enterprise carrier system must be required to provide for it at an annual out-of-pocket deficit exceeding $900,000 while foregoing the opportunity to effect economies of more than $1.6 million per year.

Before discussing this issue, we turn to a preliminary matter, raised in the briefs filed by the city of Chicago, Ill., and the metropolitan government of Nashville and Davidson County, Tenn., dealing with the decision in *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville, supra.* These litigants and others have instituted an action in the United States District Court for the Northern District of Illinois, entitled City of Chicago, et al. v United States, et al., to set aside the said decision of the Commission. The parties here ask that we request L&N to continue the operation of trains Nos. 6 and 7 voluntarily, pending full judicial review of the *C&EI* decision, and, in the

event of a refusal by L&N, that we seek a temporary restraining order prohibiting the discontinuance of the trains pending full judicial review.

It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find. Under these circumstances we have no lawful basis for ordering a continuance to await (perhaps longer than a year) developments which, in the end, might or might not change the picture.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, and others is clear proof of that. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. On the other hand, the carrier's director of industrial development testified that of 1,726 new industries located on L&N lines in the past 8 years, 843 were at points that had no rail passenger service.

He specified the factors that industry in general considers in selecting a new site—mainly, availability of such things as labor, lower wage rates, lower taxes, utilities, freight transportation (rail, truck, air, and

water), economical freight rates, access to raw materials, and cultural facilities—but availability of rail passenger service was not among them. He knew of not a single instance where rail passenger service was even mentioned. This testimony stands uncontroverted by the factual evidence of record.

Even for the individual traveler who calls upon the L&N for his occasional trip, the demand for the service of these trains is minimal. As shown in appendix B, an average of but 2.4 persons per day use train No. 6 for through service from New Orleans to Cincinnati, and only 2 per day use train No. 7 for the through run in the opposite direction. The same is true for the usage to and from the intermediate points: for example, from Mobile, a city of a quarter million, to Birmingham (population 325,000) there are only 4 passengers per day, and to Nashville (population 250,000), only 4 per day.

Local traffic between points on the 490-mile segment between Louisville and Montgomery constitutes a third of the total number of passengers—about 50 of the approximately 150 daily average who board and deboard at the various points along the 927-mile route. This area, which includes Nashville, will continue to have daily service by trains Nos. 8 and 9, the Pan American, and every-other-day service by trains Nos. 15 and 16, the South Wind. The Pan American will also be available for through passengers and for service at all points on the Hummingbird schedule. Also available are the six daily through schedules each way by bus serving practically all the points on the line, numerous bus runs on segments of the line and airline services, heretofore described. From this record we conclude that these alternate services are reasonably adequate to meet the public need for common carrier transportation services. In

the face of this conclusion, notwithstanding that some inconvenience to travelers may be encountered at times, we cannot overlook nor disregard the enormous and ever increasing losses to the carrier. This is plainly a case where there are too many trains for the diminishing needs of the public on this line. With former sources of traffic and revenue unalterably foreclosed while costs continue their upward spiral, the carrier cannot be expected to continue running a train upward of 1,000 miles each day for service along the way to about 150 persons—many of whom travel only short distances[1]—while subsidizing their travel at the rate of $14.50 out-of-pocket per passenger.

Shippers of express will have adequate service remaining by over-the-highway truck transportation, and by L&N trains Nos. 8 and 9. Buses operating over the highway also render express service. The Post Office Department will continue the mails, including parcel post, to all points by use of airplanes, trucks, and the L&N trains Nos. 8 and 9.

Considering, among other things, the sparing use now made of these long-line trains—not only by travelers, but also by the Post Office Department and shippers of express—the abundance of alternate transportation by rail and other modes, and the magnitude of the financial burden which the carrier would have to bear if the trains were continued, this is precisely the kind of circumstance for which Congress designed the relief of section 13a(1). Efforts have been made to have the law amended, including recommendations to Congress by this Commission, to provide a statutory plan for solutions to the passenger train problem under modified criteria. However meritorious

[1] For example, of the 1,763 boarding at Pascagoula during the 6 months covered by appendix B, 1,497 deboarded at Mobile, 40 miles away.

Congress may find those efforts to be, they cannot be embraced as elements for decision of the matter now before us. As an administrative agency we are bound by the law as it stands and must be governed by the intendment of Congress in its enactment.

Employee representatives have requested that appropriate conditions be imposed for protection of employees who may be affected by the discontinuance. It is well established that we have no authority to impose employee protective conditions in a section 13a discontinuance case. The adverse effect of a discontinuance upon employees is a factor to be considered in evaluating public convenience and necessity. Having weighed such factor, we conclude that any possible adverse effect upon the carrier's employees, when considered with all other facts discussed herein, does not justify the findings we would have to make before we could lawfully order continued operation of the involved trains.

Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be without material significance or not justified.

We find that the operation by the Louisville and Nashville Railroad Company of passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate commerce.

An appropriate order will be entered discontinuing the investigation herein.

COMMISSIONER BUSH concurs in the result.

APPENDIX A

No. 6 Daily (read down)	Miles		No. 7 Daily (read up)	Population 1968
8:15 a.m.	0	Lv. New Orleans, La.	Ar. 8:10 p.m.	665,000
8:20 a.m.		Lv. Carrollton Avenue	Lv. 7:50 p.m.	
	36	Lv. Rigolets	Lv.	1,106
	53	Lv. Waveland, Miss.	Lv.	5,073
9:29 a.m.	57	Lv. Bay St. Louis	Lv. 6:25 p.m.	33,000
9:51 a.m.	72	Lv. Gulfport	Lv. 6:00 p.m.	750
	79	Lv. Edgewater Park	Lv. 5:48 p.m.	47,000
10:07 a.m.	85	Lv. Biloxi	Lv. 5:40 p.m.	20,800
10:31 a.m.	105	Lv. Pascagoula	Lv. 5:10 p.m.	220,000
11:25 a.m.		Ar. Mobile, Ala.	Lv. 4:15 p.m.	
11:40 a.m.	145	Lv. Mobile, Ala.	Ar. 3:50 p.m.	
	169	Bay Minette	Lv. 3:05 p.m.	5,197
12:55 p.m.		Ar. Flomaton	Lv. 2:20 p.m.	1,454
1:00 p.m.	205	Lv. Flomaton	Ar. 2:20 p.m.	
	218	Brewton	Lv. 1:53 p.m.	6,309
	243	Evergreen	Lv. 1:28 p.m.	3,703
2:29 p.m.	279	Greenville	Lv. 12:53 p.m.	6,894
3:40 p.m.		Ar. Montgomery	Lv. 12:05 p.m.	146,000
4:10 p.m.	323	Lv. Montgomery	Ar. 10:30 a.m.	
6:10 p.m.		Ar. Birmingham	Lv. 8:15 a.m.	325,000
6:25 p.m.	421	Lv. Birmingham	Ar. 7:45 a.m.	
	473	Lv. Cullman, Ala.	Lv.	11,900
8:15 p.m.	506	Lv. Decatur	Lv. 5:59 a.m.	33,800
10:50 p.m.		Ar. Nashville, Tenn.	Lv. 3:30 a.m.	250,887
11:35 p.m.	626	Lv. Nashville, Tenn.	Ar. 2:25 a.m.	
1:00 a.m.		Ar. Bowling Green, Ky.	Lv. 12:45 a.m.	32,800
1:20 a.m.	699	Lv. Bowling Green, Ky.	Ar. 12:20 a.m.	
2:30 a.m.	771	Lv. Elizabethtown	Lv. 11:06 p.m.	10,900
4:35 a.m.		Ar. Louisville	Lv. 11:10 p.m.	392,000
5:00 a.m.	813	Lv. Louisville	Ar. 10:45 p.m.	
7:40 a.m.	922	Lv. Latonia (Covington)	Lv. 7:58 p.m.	57,000
8:10 a.m.	927	Ar. Cincinnati, Ohio	Lv. 7:40 p.m.	495,506

APPENDIX B

Louisville and Nashville Railroad Company, passengers handled on L & N Train No. 6 for 6 months period, November 1, 1967, to April 30, 1968

From	On	Daily average	Off	Daily average to	Bay St. Louis	Gulfport	Biloxi	Pascagoula	Mobile	Flomaton	Flomaton (L&N byd)	Greenville	Montgomery	Montgomery (OC)
New Orleans, La	3,404	18.7			345	282	395	171	909	56	12	33	254	
New Orleans (OC)	889	4.9			4	52	89	16	173	25	58	4	95	35
Carrollton Avenue														
Bay St. Louis, Miss	275	1.5	349	1.9		188	5	4	20				19	
Gulfport, Miss	758	4.2	522	2.9			229	122	51	1		7	36	
Biloxi, Miss	1,081	5.9	718	3.9				459	114	2		2	83	
Pascagoula, Miss	1,763	9.7	772	4.2					1,497	10		12	31	
Mobile, Ala	2,778	15.2	2,764	15.1						68	7	63	473	1
Flomaton, Ala	1,033	5.7	162	.9								25	86	
Flomaton (L&N byd)	919	5.0	77	.4								3	41	2
Greenville, Ala	442	2.4	149	.8									57	1
Montgomery, Ala	4,329	23.8	1,175	6.5										
Montgomery (OC)	90	.5	39	.2										
Birmingham, Ala	4,519	24.8	2,236	12.3										
Birmingham (OC)	168	.9	859	4.7										
Cullman, Ala	309	1.7	257	1.4										
Decatur, Ala	1,594	8.8	693	3.8										
Decatur (OC)			15	.1										
Nashville, Tenn	863	4.7	1,562	8.6										
Nashville, Tenn. (L&N byd)	656	3.6	5,912	32.5										
Bowling Green, Ky	286	1.5	106	.6										
Bowling Green (L&N byd)	1,143	6.3												
Elizabethtown, Ky	5	.1	80	.4										
Louisville, Ky	674	3.7	2,168	11.9										
Louisville (OC)			22	.1										
Latonia, Ky			31	.2										
Cincinnati, Ohio			2,811	15.4										
Cincinnati (OC)			4,479	24.6										
Total	27,958	153.6	27,958	153.6	349	522	718	772	2,764	162	77	149	1,175	39

Louisville and Nashville Railroad Company, passengers handled on L & N Train No. 6 for 6 months period, November 1, 1967, to April 30, 1968—Continued

From	On	Daily average	Off	Daily average	Birmingham	Birmingham (OC)	Cullman	Decatur	Decatur (OC)	Nashville	Nashville (L&N byd)	Bowling Green	Elizabethtown	Louisville	Louisville (OC)	Latonia	Cincinnati	Cincinnati (OC)
New Orleans, La	3,404	18.7			143		6	37		236	60	10	4	60			243	139
New Orleans (OC)	889	4.9			57	6	1	24	5	38	12	3	3	131	2		19	37
Carrollton Avenue																1	4	7
Bay St. Louis, Miss	275	1.5	349	1.9	11	2		1		1	12							
Gulfport, Miss	758	4.2	522	2.9	41	31	3	21		19	92	1		11			33	60
Biloxi, Miss	1,081	5.9	718	3.9	52	46		13		20	124			21		3	37	103
Pascagoula, Miss	1,763	9.7	772	4.2	44	25		12		10	75			6	1		17	23
Mobile, Ala	2,778	15.2	2,764	15.1	402	262	30	150	4	17	710	2	2	66	1		123	343
Flomaton, Ala	1,033	5.7	162	0.9	144	77	14	39		59	200	3	8	33	3		97	155
Flomaton (L&N byd)	919	5.0	77	0.4	119	112	7	14	3	104	239	1	1	26			49	198
Greenville, Ala	442	2.4	149	0.8	125	18		16		11	64			12			43	95
Montgomery, Ala	4,329	23.8	1,175	6.5	1,086	280	48	194	3	254	1,303	7	4	143			366	641
Montgomery (OC)	90	0.5	39	0.2	12			1		5	36			5	1		16	14
Birmingham, Ala	4,519	24.8	2,236	12.3			148	166		591	1,682	22	22	256	4	1	587	1,040
Birmingham (OC)	168	0.9	859	4.7						27	26			6			21	88
Cullman, Ala	309	1.7	257	1.4				5		14	219			15		2	23	31
Decatur, Ala	1,594	8.8	693	3.8						102	968	1	11	161		2	134	215
Decatur (OC)			15	0.1								37	7	206	7	4	223	379
Nashville, Tenn	863	4.7	1,562	8.6								19	7	328			148	154
Nashville, Tenn (L&N byd)	656	3.6	5,912	32.5									3	177	2	1	42	41
Bowling Green, Ky	266	1.5	106	0.6									8	494	1	9	293	338
Bowling Green (L&N byd)	1,143	6.3												2				3
Elizabethtown, Ky	5	0.1	80	0.4												8	293	373
Louisville, Ky	674	3.7	2,168	11.9														
Louisville (OC)			22	0.1														
Latonia, Ky			31	0.2														
Cincinnati, Ohio			2,811	15.4														
Cincinnati (OC)			4,479	24.6														
Total	27,958	153.6	27,958	153.6	2,236	859	257	693	15	1,562	5,912	106	80	2,168	22	31	2,811	4,479

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968

From	On	D/A*	Off	D/A*	Louisville	Louisville (OC)	Elizabethtown	Bowling Green	Bowling Green (L&N byd)	Nashville	Nashville (L&N byd)	Decatur	Decatur (OC)	Cullman	Birmingham	Birmingham (OC)
Cincinnati, Ohio	2,901	15.9			383		3	120	366	300	129	106		28	498	89
Cincinnati (OC)	3,960	21.8			482	2	3	45	310	285	235	175	2	36	848	81
Latonia, Ky	36	0.2			14	12	1	3	1			2		2	1	
Louisville, Ky	3,531	19.4	879	4.8			16	1,334	516	195	413	136	1	4	333	68
Louisville (OC)	101	0.6	14	0.1				1	2	10	7				4	
Elizabethtown, Ky	73	0.4	23	0.1				26	8	7	12	2			6	4
Bowling Green, Ky	117	0.6	1,529	8.4						19	40	5		1	7	7
Bowling Green (L&N byd)			1,203	6.6												
Nashville, Tenn	464	2.5	816	4.5								26		2	142	14
Nashville (L&N byd)	329	1.8	1,179	6.5								727	1	138	1,661	144
Decatur, Ala	329	1.8	1,179	6.5										3	51	10
Decatur (OC)	13	0.1	4	0.1											2	4
Cullman, Ala	49	0.3	214	1.2											7	
Birmingham, Ala	1,559	8.6	3,560	19.6												
Birmingham (OC)	239	1.3	421	2.3												
Montgomery, Ala	1,364	7.5	3,601	19.8												
Montgomery (OC)	3,557	19.5	50	0.3												
Greenville, Ala	112	0.6	550	3.0												
Evergreen, Ala	12	0.1	117	0.6												
Brewton, Ala	100	0.5	142	0.7												
Flomaton, Ala	118	0.6	1,044	5.7												
Flomaton (L&N byd)	81	0.4	777	4.3												
Bay Minette, Ala	2	0.1	69	0.4												
Mobile, Ala	1,548	8.5	3,117	17.1												
Pascagoula, Miss	359	2.0	375	2.1												

Biloxi, Miss	534	2.9	785	4.3											
Edgewater Park, Miss			7	0.1											
Gulfport, Miss	435	2.4	641	3.5											
Bay St. Louis, Miss	321	1.8	166	0.9											
Waveland, Miss	24	0.1													
Carrollton Avenue															
New Orleans, La			4,445	24.4											
New Orleans (OC)			944	5.2											
Total	27,508	151.1	27,508	151.1	879	14	23	1,529	1,203	816	836	1,179	4	214	3,560	421

*D/A daily average

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968—Continued

From	Montgomery	Montgomery (OC)	Greenville	Evergreen	Brewton	Flomaton	Flomaton (L&N byd)	Bay Minette	Mobile	Pascagoula	Biloxi	Edgewater Park	Gulfport	Bay St. Louis	Waveland	Carrollton Ave.	New Orleans	New Orleans (OC)
Cincinnati, Ohio	325	4	30	9	15	94	35	3	123	16	36		22	3			196	5
Cincinnati (OC)	514	10	61	17	20	117	100	4	206	11	17		66	6			148	29
Latonia, Ky																		
Louisville, Ky	228	1	8		5	33	14		94	13	32		32	3			97	39
Louisville (OC)	4	2				2	2		3		1						1	41
Elizabethtown, Ky	2					1	2		1								2	
Bowling Green, Ky	15					2	2		5		3		2				9	2
Bowling Green (L&N byd)																		
Nashville, Tenn	116	2	5	1	1	39	16	2	41	2	9		7				24	15
Nashville (L&N byd)	1,879	26	98	21	22	232	209	3	661	69	132	1	95	9			62	78
Decatur, Ala	14		10	2	3	33	2	1	68	14	6		10				13	3
Decatur (OC)	2						1		3		1							
Cullman, Ala	25				2	3			2	1			2	1			1	
Birmingham, Ala	892		98	33	4	97	53	11	273	23	30		23	4			112	12
Birmingham (OC)	93	4	11			19	11		82	2	16		6				2	2
Montgomery, Ala			229	8	19	55	65	1	888	36	68	2	58	8			266	41
Montgomery (OC)		6	99	41	61	243	277	32	248	82	255		265	80			873	240
Greenville, Ala						4	2		65	5	3		5				26	9
Evergreen, Ala						1					1						10	
Brewton, Ala						93			2	2							3	
Flomaton, Ala								3	35	6	3		6				40	23

Flimsten (LAN by-d)								3	5		6		3				27	20
Bay Minette, Ala																	2	
Mobile, Ala										96	60	4	47	33			2,145	145
Pascagoula, Miss											45		15	7			261	31
Biloxi, Miss													20	10			429	75
Edgewater Park, Miss																		
Gulfport, Miss														42			337	30
Bay St. Louis, Miss																	317	4
Waveland, Miss																	5	10
Carrollton Avenue																		
New Orleans, La																		
New Orleans (OC)																		
Total	3,601	30	330	117	162	1,044	777	69	3,112	375	785	7	641	166			4,443	944

APPENDIX C

	Year 1967 trains Nos. 6 and 7	First 4 months 1968 trains Nos. 6 and 7	Projected year 1968		
			Annual projection from actual results of April 1968 trains Nos. 6 and 7	Estimated revenues retained, expenses not saved from discontinuance of trains Nos. 6 and 7	Estimated revenues lost and expenses saved
Revenues:					
1. Passenger	$1,331,960	$360,915	$740,290	$399,437	$341,259
2. Dining	160,994	28,820	89,324	32,617	43,907
3. U.S. Mail	1,060,163	241,040	753,176	314,912	338,264
4. Express	309,319	52,606			
5. Baggage	2,323	1,764	3,817	2,909	2,908
6. Total	2,830,559	376,747	1,587,607	939,689	626,334
Expenses (out-of-pocket):					
7. Wages of train and enginecrews	721,702	229,170	632,520		632,520
8. Locomotive repairs	292,829	91,661	271,699		271,699
9. Locomotive fuel	276,260	66,914	220,765		220,765
10. Locomotive water, lubricants, and other supplies	35,164	11,019	32,652		32,652
11. Locomotive enginehouse expense	34,942	17,214	51,022		51,022
12. Locomotive depreciation	66,686	15,336	46,660		46,660
13. Car repairs	344,153	78,662	209,533	79,103	130,430
14. Car depreciation	23,966	5,266	15,042	8,476	6,566
15. Rent for passenger cars	171,994	26,709	45,365		45,365
16. Train supplies and expenses	278,192	88,296	143,682	42,407	101,276
17. Personal injury and livestock damage	66,538	28,684	86,554		86,554
18. Dining expenses	372,338	68,121	247,379	11,708	235,671
19. Pullman deficit	313,119	62,949	186,428		186,428
20. Cincinnati joint terminal expenses	326,134	80,896	255,618	64,604	191,014
21. Louisville joint terminal expenses	19,960				

22. Decatur joint terminal expenses	9,774	2,176	7,263	6,648	715
23. Montgomery joint terminal expenses	30,704	8,704	31,034	17,011	14,023
24. New Orleans joint terminal expenses	92,559	25,115	66,286	8,746	90,540
25. Total	3,480,006	918,144	2,561,055	238,663	2,322,392
26. Net out-of-pocket (loss) gain	(640,467)	(343,397)	(293,248)		
27. Gain from feeder services	144,646	33,936	83,581		
28. Net out-of-pocket (loss) after feeder gain	(525,361)	(309,461)	(209,667)		
				Expenses—annual projection	2,322,392
				Revenues—annual projection	628,338
				Savings to L. & N. Railroad Co.	1,694,054
				Less projectected feeder revenue gain	83,581
				Net annual savings to L. & N.	1,610,473

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U.S. GOVERNMENT PRINTING OFFICE: 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CITY OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court (App. A, *infra.*, pp. 11–16) is not yet reported. The report of the Interstate Commerce Commission (App. C, *infra,* pp. 24–41) is published at 331 I.C.C. 447.

JURISDICTION

The judgment of the three-judge court (App. A *infra*) was entered on March 19, 1970. Notices of appeal (App. B, *infra*) were filed by the Interstate Commerce Commission and the United States on May 14, 1970, and May 18, 1970, respectively. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States,* 396 U.S. 162.

398-034 O—70——1

QUESTION PRESENTED

Whether Section 13a(1) of the Interstate Commerce Act requires a railroad seeking to discontinue its segment of a through passenger train (operated in conjunction with another railroad) to give notice of the proposed discontinuance in states served only by the other railroad.

STATUTE INVOLVED

Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)) provides:

> A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pend-

ency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an

order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

STATEMENT

On August 31, 1967, the Chicago & Eastern Illinois Railroad Co. (C&EI) filed a notice under Section 13a (1) of the Interstate Commerce Act (49 U.S.C. 13a (1)) proposing to discontinue a pair of trains, known as the "Georgian," operated by it between Chicago, Illinois and Evansville, Indiana. These trains operated in conjunction with trains of the Louisville & Nashville Railroad (L&N), which ran between Evansville and Atlanta, Georgia. A passenger could thus ride between Chicago and Atlanta, over two railroads, without changing cars.[1]

On January 25, 1968, after hearings, the Commission authorized C&EI to discontinue the trains, finding that continued operation was not required by public convenience and necessity, and would unduly burden interstate commerce. *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (App. C *infra*). The C&EI trains stopped running on February 2, 1968, and have not operated since.

[1] C&EI and L&N also operated in the same manner between Chicago and Montgomery, Alabama. However, no issue was raised below as to this operation.

A suit seeking review of the Commission order was filed in the court below in May 1968. That court dismissed the action in January 1969, holding that the Commission decision was not reviewable. *City of Chicago* v. *United States*, 294 F. Supp. 1103. That decision was subsequently reversed by this Court, which remanded the case to the court below. *City of Chicago* v. *United States*, 396 U.S. 162.

The plaintiffs below then renewed an earlier motion (previously briefed and argued) seeking reversal on the ground that C&EI had not properly given notice in accordance with Section 13a(1). Specifically, they contended that C&EI was required to post notices at various points served by the connecting L&N trains, and to mail notices to the governors of states served by the L&N trains. On February 5, 1970, the lower court entered an order summarily remanding the case to the Interstate Commerce Commission. On March 19, 1970, after various motions, the court vacated its prior order and entered a new judgment remanding the matter to the agency for further proceedings (App. A, *infra*). This order was accompanied by a brief opinion which stated, without explanation, that "the public did not receive adequate notice from the railroads or the I.C.C. proceedings; * * *" (App. A, *infra*, p. 15). In addition, the court held that the residents and Governors of Kentucky, Tennessee, and Georgia should have been given notice of the Commission proceedings (*ibid.*).

The merits of the Commission's decision authorizing discontinuance were not reviewed and are not in issue here.[2]

THE QUESTION IS SUBSTANTIAL

The decision below, requiring that a railroad give notice of proposed discontinuance in areas served not by it, but by connecting roads, has important impact on the administration of Section 13a(1). The Commission has always read the notice requirements of this statute as applying only to the stations and states actually served by the road seeking discontinuance. Although settled administrative interpretation is a consideration entitled to great weight on review, see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, the court below failed even to take cognizance of it. Many prior cases, processed under this administrative interpretation, could now be open to challenge under the court's reading, there being no time limitation (other than the uncertain doctrine of laches) applicable to review of Commission orders.[3] In addition, numerous through passenger trains

[2] In the same order, the court also remanded to the Commission the matter of its separate authorization for discontinuance of another related L&N train, on the ground that that discontinuance could not properly be considered apart from the instant case. We have separately appealed from that remand (there being a separate case in the district court) and are filing a Jurisdictional Statement with respect thereto contemporaneously herewith (*United States, et al.* v. *Tennessee Public Service Commission, et al.*).

[3] It can be argued that the lower court's notice theory, if valid, exposes a jurisdictional defect in the prior cases. Under Section 13a(1), the Commission acquires power over the trains, thus supplanting state regulatory authorities, only "upon the filing of such notice".

are presently operated by two or more railroads on a cooperating basis.[4] The proper handling of any case involving such trains, when one of the participating roads seeks to discontinue only its segment, is rendered uncertain by the result below. Definitive interpretation of the statute's notice requirements by this Court would clarify the matter.

In our view the decision below is erroneous under the statute. The mechanism of Section 13a(1) is triggered by a "carrier or carriers * * * if their rights with respect to the discontinuance * * * [of an interstate train] are subject to * * *" state regulation. To seek Commission relief, the carrier must give notice "to the Governor of each State in which such train * * * is operated," and post notices at various points "served" by the train.

Here the C&EI operated only between Chicago and Evansville. To hold that C&EI must post notices in Kentucky, Tennessee, and Georgia is inconsistent with the statute's language and purpose. C&EI's "rights"

[4] These include operations between New York and Montreal via Penn Central and Delaware and Hudson; between Boston, New York and New Orleans via Penn Central and Southern; several daily trains between the Northeast and Florida points via Penn Central and Seaboard Coast Line; trains between Chicago and Florida via Illinois Central, Central of Georgia and Seaboard, and via Penn Central, L&N and Seaboard; trains between Louisville, New Orleans and Florida points via L&N and Seaboard; trains between Chicago and California points via Milwaukee, Union Pacific and in some instances, Southern Pacific; and the current version of the former "California Zephyr" operating between Chicago and San Francisco via Burlington, Denver & Rio Grande Western, and Southern Pacific.

were in no way "subject to" regulation by those states. No train was "operated" by C&EI in those states; no C&EI train "served" those states.[5]

The decision below might be arguably supported if Section 13a had been intended to assist states and localities seeking to preserve long-haul passenger service. But the statute was designed to aid railroads in circumventing unresponsive state regulatory commissions. *Southern R. Co.* v. *North Carolina*, 376 U.S. 93; *City of Chicago* v. *United States*, 396 U.S. 162. As expressed in the House Committee Report, "* * * it is proposed to add a new Section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State Commissions, pass upon the discontinuance or change in the operation of service of any train or ferry." House Report No. 1922, 85th Cong., 2d Sess., p. 12 (1958). Respect for the statutory scheme suggests that the Commission would replace state commissions only to the extent that they could have defeated a carrier's attempt to discontinue a train. Hence there should be no requirement as to notice in states which had no regulatory power over the carrier.

[5] For other purposes, a carrier is not normally regarded as "serving" points where it does not physically operate. See *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga.), aff'd *per curiam*, 356 U.S. 273; *Chicago & Eastern Illinois R. Co.* v. *Illinois Central R. Co.*, 261 F. Supp. 289 (N.D. Ill.).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
GREGORY B. HOVENDON,
ROBERT B. NICHOLSON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

JULY 1970.

APPENDIX A

United States District Court for the Northern District of Illinois Eastern Division

No. 68 C 956

CITY OF CHICAGO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970, entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Rail-

road Company ("C&EI") for rehearing or amendment of said order of February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion; and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> ". . . petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

> "Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1–2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

> "In *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed per curiam 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route . . .*" (Emphasis supplied)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate

operation of the "Hummingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both

causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

(S) WIN G. KNOCH,
Circuit Judge.

(S) J. SAM PERRY,
District Judge.

(S) EDWIN A. ROBSON,
District Judge.

Dated Chicago, Illinois, March 19, 1970.

APPENDIX B

In the United States District Court for the Northern District of Illinois Eastern Division

Civil Action No. 68 C 956

CITY OF CHICAGO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

I

Notice is hereby given that the United States of America, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 24725.

II

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its

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transmission to the Clerk of the Supreme Court of the United States.

RICHARD W. MCLAREN,
Assistant Attorney General,

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530

THOMAS A. FORAN,
United States Attorney,
Chicago, Illinois 60604

Attorneys for the United States of America.

PROOF OF SERVICE

I, John H. D. Wigger, one of the attorneys for defendant United States of America, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendell W. Wright, Esq. and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doolittle, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding Avenue, Terre Haute, Indiana

47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission, State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 Southern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn, Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first-class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant Interstate Commerce Commission by mailing copies with first-class postage prepaid to Robert W. Ginnane, General Counsel, and Jerome Nelson, Attorney, Interstate Commerce Commission, Washington, D.C. 20423.

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

[Filed, May 18, 1970]

In the United States District Court for the Northern District of Illinois Eastern Division

Civil Action No. 68 C 956

CITY OF CHICAGO, ET. AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE INTERSTATE COMMERCE COMMISSION

I

Notice is hereby given that the Interstate Commerce Commission, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 24725.

II

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

PROOF OF SERVICE

I, Jerome Nelson, one of the attorneys for defendant Interstate Commerce Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendall W. Wright, Esq. and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doolittle, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding Avenue, Terre Haute, Indiana 47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission, State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 South-

ern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn, Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant United States of America by mailing copies with first-class postage prepaid to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; to the Honorable Thomas A. Foran, United States Attorney, Chicago, Illinois 60604; to the Honorable Richard W. McLaren, Assistant Attorney General of the United States and the Honorable John H. D. Wigger, Attorney, Department of Justice, Washington, D.C. 20530.

JEROME NELSON,
Attorney,
Interstate Commerce Commission.

[Filed, May 14, 1970]

APPENDIX C

Served January 31, 1968

F-9449

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, B. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson,

Earl G. Quinn, Keith E. Roberts, J. H. Smith, and *George P. Sheahan* for various railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND STAFFORD

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of 4 months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

[1]By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No. 24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Trains Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles		Stations		Train No. 54 daily
P.M.					A.M.
3:45	0.0	Lv.	Chicago, Ill.	Ar.	10:35
3:59	6.6		Chicago (63rd St.)		10:21
A4:30	28.8		Steger	E	9:44
	77.5		Watseka	G	8:49
6:10	123.2		Danville		7:55
7:15	177.5		Terre Haute, Ind.		6:40
B7:45	203.7		Sullivan	G	6:11
8:18	234.7		Vincennes		5:40
D8:50	259.0		Princeton		5:05
9:55	287.2	Ar.	Evansville	Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches originating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal.

Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta, Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230, 225, and 176, respectively, of which 84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at

[2]Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470 due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months

of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-of-pocket expenses of $1,001,950 for a net income of $94,657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including car-hire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967, when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted

in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 54
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-380 Passenger traffic[4]	21,996	16,036

	Train No. 93	Train No. 54
Transportation:		
373 Station employees[4]	$15,650	$14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train enginemen[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168
400 Enginehouse expense—train[11]	8,108	8,108
401 Trainmen[10]	67,844	67,134
402 Train supplies and expenses[12]	88,308	88,308
403 Operating sleeping cars[4]	49,060	37,392
409 Employee health and welfare benefits[8]	5,163	5,222
Insurance[13]	16,405	16,405
419 Loss and damage—baggage[14]	550	480
420 Injuries to persons[14]	41,044	2,754
441 Dining and buffet service [4]	71,188	71,188
General:		
452 Clerks, accounting[4]	9,142	8,488
456 Employee health and welfare benefits[4]	360	324
All joint facility accounts[15]	170,720	170,720
532 Railway tax accruals[16]	21,958	21,542
Total expenses	918,969	862,563

[1]1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.

[2]Projected based on current traffic.

[3]Projected based on car assignments.

[4]Projected based on first 6 months 1967 expenses.

[5]Projected based on estimated car miles @ first 6 months 1967 cost per car mile.

[6]Based on two unit assignment.

[7]Based on cars required.

[8]Based on current G.M.A. rates applied to labor only.

[9]Based on current assignment.

[10]Based on 1966 payments plus wage increases.

[11]Based on 2 unit assignment @ first month 1967 cost per unit miles.

[12]Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.

[13]Based on current premiums.

[14]Based on 2.5 year average.

[15]Based on estimated car assignments.

[16]Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Milford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses desire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out

that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 members who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of

C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or

twice a year during inclement weather. Student ownership of automobiles by upper classmen is permitted and some of the students use the trains only when they cannot obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the

strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplaines cut transport time tremendously for people, mail and express. The automobile and the supper highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatic change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous problems flowing therefrom regarding rehabilitation of its line and recovery of traffic. See *Missouri Pac. R. Co.–Control–Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occassional or standby basis. Their primary

means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger-use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

APPENDIX A

Statement of revenues and expenses for trains Nos. 31 and 32 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 31	Train No. 32	Train No. 31	Train No. 32	Train No. 31	Train No. 32
Revenues:						
103 Coach (1)	$ 516,762	$ 480,139	$ 532,957	$ 468,569	$ 235,039	$ 197,399
107 Parlor cars (1)	90,033	122,097	87,680	113,393	33,431	45,173
109-110 Baggage & other (1)	4,606	483	2,370	153	1,970	315
106 Mail-RPO (1)	61,043	62,304	63,843	63,843	32,483	32,483
108 Mail-storage (1)	101,137	92,854	101,631	99,111	110,356	97,510
107 Express (1)	2,311	904	2,933	4,762	7,258	6,636
131 Dining & buffet (1)	65,870	65,873	67,844	67,844	34,910	34,910
Total Revenues	1,041,762	824,654	1,067,256	934,975	435,047	317,381
501-530 Car hire, net (1)	53,844	40,468	37,128	(1,000)	(1,000)	(14,000)
Total Income (1)	1,095,606	865,122	1,104,384	933,975	434,047	303,381
Total Expense (See below)	1,081,930	861,270	1,171,787	1,022,127	537,625	477,287
PROFIT OR (LOSS)	13,677	(36,148)	(67,403)	(88,152)	(103,578)	(173,906)
Maintenance of Equipment:						
311 Repairs, Diesel locomotives (3)	54,497	54,897	70,399	70,939	36,703	36,695
317 Passenger-train car: Repair (4)	89,300	77,311	176,053	163,072	75,937	70,866
331 Equip.Depre.(32)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Depre.(34)Pass.Cars(6)	56,051	55,779	56,111	56,631	28,498	27,867
339 Emp.,Misc benefits (7)	2,334	2,175	2,918	2,841	1,799	1,250
Traffic:						
391-392 Passenger Traffic (8)	17,896	13,539	19,959	14,914	10,999	8,019
Transportation:						
373 Station employees (9)	67,605	28,766	66,723	29,770	34,154	11,641
376 Sta. supplies & exp. (10)	1,568	1,569	1,568	1,568	1,311	1,186
378 Yard Cond. & Othmn. (11)	1,436	1,436	1,681	1,681	1,311	1,186
382 Train engineers (1)	48,669	51,393	47,803	50,565	23,674	24,517
384 Train Fuel (3)	58,187	54,614	46,130	44,103	18,407	18,401
387 Water for train Loco. (3)	1,584	1,317	1,686	1,510	1,078	1,078
388 Lubr. for train Loco. (3)	3,748	3,744	3,127	3,156	2,345	2,349
389 Other supplies for train Loco. (3)	646	654	327	380	101	101
400 Engines, supplies train (3)	14,830	14,829	12,393	12,511	6,909	6,909
401 Trainmen (1)	61,181	61,861	64,631	63,037	29,278	29,201
407 Train supplies & exp. (12)	64,778	57,268	69,605	66,077	47,025	44,627
403 Operating sleeping cars (1)	44,199	44,303	41,171	41,581	20,530	18,668
409 Emps. Misc benefits (13)	7,727	6,134	6,906	5,988	3,439	2,668
Insurance (1)	13,173	13,172	13,178	13,178	6,744	6,744
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & Damage-baggage (1)	330	20	602	602	666	666
430 Injuries to persons (1)	28,350	2,377	22,787	2,991	11,000	1,847
441 Dining & buffet serv. (1)	69,161	69,161	76,839	76,839	33,594	33,594
General:						
452 Clerks, accounting (14)	13,566	13,566	10,972	10,292	4,571	4,139
456 Emps. Misc benefits (15)	580	574	626	604	180	162
451 Joint Facility Accounts (16)	212,554	219,158	266,112	236,092	119,869	113,697
532 Dp. tax accruals (17)	26,250	20,194	29,631	23,241	10,273	10,422
TOTAL EXPENSES:	1,081,930	861,270	1,171,787	1,022,127	537,625	477,287

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue per mile.
(9) Includes mail handlers, also (34) station employees.
(10) Three Nos. 31 and 32's portion of benefits equal expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 376, 382 and 400.
(14) Revenue per ream of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Seventy portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.P. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 331 through 340, 373, 376, 382, 400, 452.

331 I.C.C.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. NEIL GARSON,

(SEAL) Secretary.

U.S. GOVERNMENT PRINTING OFFICE : 1970 O - 398-034

Supreme Court, U.S.
FILED
JUL 15 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellant,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - - - Appellees.

On Appeal From the United States District Court For The Northern District of Illinois

JURISDICTIONAL STATEMENT

HARRY R. BEGLEY,
72 West Adams St.,
Suite 1500,
Chicago, Illinois 60603,

JOSEPH L. LENIHAN,
CLIFFORD T. COOMES,
JAMES W. HOELAND,
(Counsel of record on whom service is to be made)
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellant, Louisville and Nashville Railroad Company.

Due Date: July 17, 1970.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ———

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Appellant,*

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT.

Appellant, Louisville and Nashville Railroad Company, appeals from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered in the form of an order on February 5, 1970, as amended and modified on March 19, 1970, setting aside an order of the Interstate Commerce Commission. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the court below is contained in its order of February 5, 1970, and its amending and modifying order of March 19, 1970, and they are reproduced and attached, respectively, as Appendix A and Appendix B. These orders are not reported. The opinion of the Interstate Commerce Commission is reported at 333 I.C.C. 720 (1968).

JURISDICTION

This suit was brought by appellees under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the district court was entered in the form of an order on February 5, 1970, as amended and modified by order entered March 19, 1970. Notice of appeal was filed in the court below on April 17, 1970. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal. *United States v. Drum*, 368 U. S. 370 (1961); *Dixie Carriers, Inc. v. United States*, 351 U. S. 56 (1956).

QUESTIONS PRESENTED

1. Whether the court below, convened pursuant to the provisions of 28 U.S.C. § 1336 to review an order of the Interstate Commerce Commission upon suit brought by appellees, acted properly in summarily vacating the

order of the Commission and remanding the case to the Commission for further proceedings without recognizing and granting the right to the parties to be heard on the merits of the case, without making the required findings of fact and conclusions of law, and without finding that the Commission in any respect erred in issuing its order.

2. Whether the court below, when this case was pending before it on the issue of whether the case should be remanded to the Interstate Commerce Commission for further proceedings, had the authority to require, by mandatory order, that the appellant reestablish a passenger train service which had been lawfully discontinued for some eighteen months pursuant to the provisions of section 13a(1) of the Interstate Commerce Act.

STATUTES INVOLVED

28 U.S.C. § 2325 and Section 13a(1) of the Interstate Commerce Act [49 U.S.C. § 13a(1)] are set forth in Appendix C hereto.

STATEMENT

By report and order served September 6, 1968, the Interstate Commerce Commission discontinued its investigation of Louisville and Nashville Railroad Company (L&N) passenger trains Nos. 6 and 7, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. *Louisville & N. R. Co. Discontinuance of Trains,* 333 I.C.C. 720 (1968). Such investigation was held pursuant to the provisions of Section 13a(1) of

the Interstate Commerce Act, with hearings conducted at various points along the route of the trains.

The Tennessee Public Service Commission and certain other appellees herein instituted an action in the court below on September 6, 1968, and obtained a temporary restraining order against the discontinuance of the trains. The case was assigned No. 68 C 1666.

On November 4, 1968, the three-judge court was convened and heard argument on various motions, none of which dealt with the cases on their merits.[1]

On January 8, 1969, the court below issued its orders dismissing the complaints in No. 68 C 1666 [*Tennessee Public Service Commission v. United States*, 294 F. Supp. 1106 (1969)] and in No. 68 C 956 [*City of Chicago v. United States*, 294 F. Supp. 1103 (1969)] for lack of jurisdiction in the court to review an order, issued by the Commission under the provisions of Section 13a(1), discontinuing its investigation of a proposed train discontinuance. The court also dissolved the temporary restraining order in No. 68 C 1666.

Plaintiffs' applications for stays from the court below and this Court were denied. Accordingly, the trains were discontinued.

Upon appeal to this Court, probable jurisdiction of the C&EI and L&N cases was noted, and they were consolidated because they presented to this Court the same question, namely, whether the Commission's orders were subject to judicial review. On December 9, 1969,

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[1]Heard by the court below at the same time were motions in No. 68 C 956, an action to set aside the Commission's order authorizing discontinuance by Chicago & Eastern Illinois Railroad Company (C&EI) of its trains Nos. 54 and 93, which formerly operated between Chicago, Illinois, and Evansville, Indiana.

this Court issued its opinion, reversing and remanding the cases to the court below for further proceedings in conformity with the opinion of this Court. *City of Chicago v. United States,* 396 U. S. 162.

Thereafter, on January 7, 1970, Tennessee Public Service Commission, and certain other appellees herein, filed with the court below a document captioned "Motion on Mandate of the Supreme Court" seeking, among other things, the reinstatement of the restraining order which had been dissolved by the court below on January 8, 1969. L&N replied to that motion. By order dated February 5, 1970, the court below, without receiving oral or written argument on the merits, ordered that Nos. 68 C 956 (the C&EI case) and 68 C 1666 (the L&N case) be remanded to the Commission for further proceedings, apparently in the mistaken belief that this Court's opinion and judgment required summary vacation of the Commission's orders and remand to the Commission for further proceedings. The court held under advisement until the Commission entered a final order the motion to require L&N to reinstitute operation of the trains.

Thereafter, L&N and C&EI, in their respective cases, and the government in both cases, sought reconsideration of the order. L&N contended, among other things, that the court had no power to remand the L&N case summarily to the Commission without hearing and disposition of the case on its merits. Tennessee Public Service Commission and other appellees herein also petitioned the court below seeking, again,

an order requiring the L&N to commence operation of the trains.

On March 19, 1970, the court below, still without hearing argument or receiving briefs on the merits of the cases, reaffirmed its February 5 order in Nos. 68 C 956 and 68 C 1666 insofar as it vacated and set aside the Commission's orders and remanded the two cases to the Commission for further proceedings. Moreover, the court below summarily directed the Commission to consolidate the cases and modified its first order so as to require L&N to re-institute the operation of the trains.

L&N filed a motion in the court below for a stay of its order pending appeal to this Court. The motion was denied on March 27, 1970, but L&N's application to this Court for a stay of the order of the court below was granted on April 3, 1970, by this Court, *en banc,* Mr. Justice Douglas dissenting.

L&N filed its notice of appeal in the court below on April 17, 1970, as amended on that date. The notice and amendment are attached hereto as Appendix D and Appendix E, respectively.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

When plaintiffs below brought the action to set aside the Commission's order, they sought a decision under established standards of review of administrative orders. The court below, however, did not under-

take such review because it concluded that orders discontinuing investigations under Section 13a(1) are not subject to judicial review, and the complaint was dismissed.

On appeal, this Court reversed the court below on that issue, the only issue involved in the appeal. *City of Chicago v. United States,* 396 U. S. 162 (1969).

The mandate of this Court is, of course, "controlling as to matters within its compass." *Sprague v. Ticonic Bank,* 307 U. S. 161, 168 (1939). Nothing in the mandate could properly be construed by the court below to constitute a decision on the merits or to require or even to suggest a remand of the case summarily to the Commission. The court below had the *duty* on remand to review the case on its merits to determine whether the action of the Commission had warrant in the record and a reasonable basis in law. *American Airlines v. Civil Aeronautics Board,* 231 F. 2d 483 (D.C. Cir. 1956); *Aberdeen and Rockfish R.R. v. United States,* 270 F. Supp. 695 (D.C. La. 1967), *modified and aff'd sub nom., Baltimore & O. R.R. v. Aberdeen & Rockfish R.R.,* 393 U.S. 87 (1968). Accordingly, the court below should have treated the case on remand exactly as it came originally to that court. *Union Pac. R.R. v. Johnson,* 249 F. 2d 674, 676 (9th Cir. 1957).

The only hearing before the three-judge court in this case was held on November 4, 1968, at which various preliminary motions were argued. The merits of the case were not then, or at any other time, argued and

no briefs on the merits have ever been filed.[1] Thus, defendant has never been given the opportunity to show to the court below that the plaintiff who would upset an order of the Interstate Commerce Commission "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences, ..." *I.C.C. v. Jersey City*, 322 U. S. 503 (1944); that the findings of the Commission are made by law *prima facie* true, *Illinois C. R. R. v. Interstate Com. Comm'n.*, 206 U. S. 441 (1907); that the Commission's conclusions when supported by substantial evidence are final, *Interstate Com. Comm'n. v. Union Pac. R.R.*, 222 U. S. 541 (1912); and that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the Commission, *Miss. Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934). Instead, the court below has disposed of the case in summary manner, without hearing argument or receiving briefs on the merits, and has included in its final order a mandatory injunction without supporting basis.

The right to submit argument to the court is an essential of a full hearing on the merits. *Cf. Morgan v. United States*, 304 U.S. 1, 18 (1938). A permanent injunction granted against a party who was afforded no opportunity to argue against it is invalid and should, on appeal, be set aside. *Cf. Sims v. Greene*, 161 F. 2d 87 (3d Cir. 1947).

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[1]Counsel for appellees recognized that the November 4, 1968, hearing was not on the merits (Transcript of November 4, 1968, hearing, p. 26, which is on file in this Court as part of the record in the previous appeal).

28 USC § 2325 provides as follows:

> . . .
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is *heard and determined* by a district court of three judges under section 2284 of this title." (Emphasis added)

And this Court, construing this provision in *Ayrshire Corp. v. United States,* 331 U.S. 132, 137 (1947), held:

> "When the framers of the Urgent Deficiencies Act declared that these applications 'shall be heard and determined by three judges,' we assume that they meant exactly what they said. The requirement that three judges hear and determine an application means that they must adjudicate the issues of law and fact which are presented by the case, a function which implies that they must weigh the arguments and testimony offered by both sides and vote either to grant or deny the relief sought by the moving party."

In setting aside the Commission's order, the court below has completely failed to "adjudicate the issues of law and fact which are presented by the case." The court below did not hear argument and did not receive briefs on such pertinent issues as whether the Commission correctly concluded that continued operation of the trains is not required by public convenience and necessity and will unduly burden interstate commerce, the statutory standards in issue in Section 13a(1) cases. The court below did not hear

argument, receive briefs or rule that the Commission erred in finding that the L&N would "suffer out-of-pocket losses in excess of $900,000 annually;" and that "[n]othing in the record indicates that the deficit could be abated in future years" (333 I.C.C. at p. 727). In addition, the court below did not pass on the issue of the minimal use of the trains which caused the Commission to find (333 I.C.C. at p. 729):

> "'This is plainly a case where there are too many trains for the diminishing needs of the public on this line."

Nowhere in the order of the court below is there any finding that the Commission was in error in making these essential and dispositive findings and at no time did defendants have an opportunity to brief or to argue these points. L&N was entitled to have the case tried and decided in the court below on its merits. This was not done.

In addition to improperly vacating the Commission's order, the order entered by the court below requires L&N to reinstate trains the operation of which was discontinued more than 18 months ago. The order is not a temporary restraining order; it is a permanent injunction, and the court below entered it without a hearing on the merits and without making the necessary findings of fact and conclusions of law.

The specific limits of the authority of a 3-judge district court to enter a temporary restraining order are set out in 28 U.S.C. § 2284. It provides that where an application for an interlocutory injunction is made, the district judge to whom the application is made may

"grant a temporary restraining order to prevent irreparable injury." The section further provides that unless revoked by the district judge, a temporary restraining order shall remain in force "until the hearing and determination by the full court." The order of which we complain is not one entered to prevent irreparable injury until the hearing and determination by the full court. It was entered by the full court as their final order. It does not maintain the *status quo* to prevent irreparable injury; it is a permanent injunction issued upon the vacation of the Commission's order and requires a restoration of trains discontinued over 18 months ago.

In *Ettelson v. Metropolitan Ins. Co.*, 317 U.S. 188 (1942), this Court said that in deciding whether an order is an injunction, the question is not to be decided by the terminology used by the lower court but by the substantial effect of the order made. Guided by the *Ettelson* case, the Court of Appeals for the 3d Circuit, in *Sims v. Greene*, 160 F. 2d 512 (1947), ruled that a "restraining order" continued in effect by the lower court was in fact a temporary injunction and that it was improperly entered because the trial court had not made the findings and conclusions required by Rule 52 of the Federal Rules of Civil Procedure.[1]

---

[1]Rule 52(a) provides in pertinent part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; *and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.*" (Emphasis added)

This Court has squarely held that Rule 52(a) must be observed by three-judge district courts such as the one below. Please see *Mayo v. Canning Co.*, 309 U.S. 310 (1940), where the Court said of an injunction issued by such a court (p. 316):

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

Rule 52(a) likewise applies to a judgment such as the one below granting a permanent injunction. *Chas. Pfizer & Co. v. Zenith Laboratories, Inc.*, 339 F. 2d 429 (3d Cir. 1964); *Tribune Review Publishing Co. v. Thomas*, 133 F. Supp. 486 (W.D. Pa. 1957).

The high importance of compliance with Rule 52(a) is clearly pointed up by the case at bar. The court below failed to state or even suggest the basis upon which the Commission in any respect erred in authorizing discontinuance by L&N of trains Nos. 6 and 7. The court made no findings or conclusions with respect to any of the following: whether sufficient evidence supported the Commission's preliminary or ultimate findings; whether the Commission made adequate findings; whether the Commission erred as a matter of law[1]; whether the Commission, in any way, acted ar-

[1]The issue of law concerning the posting of notices at points beyond the line of the carrier proposing discontinuance, an issue involved in the *C&EI* case, was not, and could not properly have been, raised in the court below in the *L&N* case.

bitrarily or capriciously. Indeed, the failure of the court below to try this case on its merits prevented it from having a knowledge of the case and so deprived it of any basis for making any such findings, none of which could have been made, we submit, had judicial review been undertaken. Accordingly, on remand of the case to the Commission, the Commission and the parties would be at a loss in their attempt to determine the purpose and extent of further proceedings to cure unknown deficiencies in the Commission's report and order.

II

Section 13a(1) of the Interstate Commerce Act limits the Commission to requiring continued operation of passenger trains for a period not to exceed four months after the end of the railroad's thirty-day notice of discontinuance, unless the Commission, after investigation, orders the trains to be continued for a period not to exceed one year. The effect of the mandatory order of the court below in this case is to extend the period of operation of the trains beyond the four-month suspension period provided in the statute. This Court has held that such a statutory period cannot be so extended. *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963).

In the *Arrow* case, *supra*, the Court held that Congress had provided the Commission with a power under Section 15(7) of the Interstate Commerce Act to sus-

pend a freight rate for a period of no longer than seven months, and that a federal district court had no authority to extend that seven-month period by the issuance of a temporary restraining order. In so holding, this Court said (p. 667):

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief."

The analogy between the suspension power of the Commission under Section 15(7) and its suspension power under Section 13a(1) is clear. Congress in each instance provided a specific suspension period for a specific reason. With respect to the suspension of freight rates, the seven-month period was enacted to bring about uniformity in freight rates and to avoid competitive inequities. *Arrow* case, *supra*, at 662-663. The suspension period provided in Section 13a(1) was set at four months to avoid the needless delays previously encountered by the railroads in proceedings before state regulatory bodies in eliminating costly and little-used passenger trains [H. Rep. No. 1922, 85th Cong. 2nd Sess. (1958), 1958 *U. S. Code Cong. & Ad. News*, pp. 3467-3468].

Moreover, the form of the order of the court below, requiring reinstitution of operation of trains lawfully discontinued in accordance with agency action, exceeds

the function of judicial review, assuming *arguendo* that the court did, in fact, undertake review of the case on the merits.

Section 13a(1) empowers the Commission alone to determine whether a particular train is or is not to be operated, and this is true whether such determination occurs before or after the train has ceased operation. It provides in pertinent part as follows:

> "If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance *or restoration* of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order." (Emphasis added.)

Thus the court below exceeded its power by ordering reinstitution of the trains, a matter left, by statute, solely to the judgment of the Commission.

The function of a court in reviewing an order of the Commission has been clearly defined by this Court in numerous cases, and in no instance has this Court sanctioned an attempt by a reviewing court to exercise a function which Congress committed to agency action. As this Court held in *Federal Communications Comm'n. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), "an administrative determination in which

is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." And hence "[a]fter the remand was made . . . the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities Comm'n. v. Chenery Corp.*, 332 U. S. 194, 201 (1947). Please see also: *Federal Power Comm'n. v. Idaho Power Co.*, 344 U. S. 17, 20 (1952); *United States v. Saskatchewan Minerals*, 385 U. S. 94 (1966).

Accordingly, the court below erred in issuing a mandatory order requiring L&N to begin operation of the trains.[1]

---

[1]In addition, the court below erred in requiring the Commission to consolidate the L&N and C&EI cases on remand. This, also, is a matter for the Commission's discretion, not the court's. *Cf. Boston and Maine R.R. v. United States*, 208 F. Supp. 661, 677 (D.C. Mass. 1962).

CONCLUSION

The questions presented are substantial. For the reasons stated, it is urged that the judgment of the court below be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

HARRY R. BEGLEY,
72 West Adams St.,
Suite 1500,
Chicago, Illinois 60603,

JOSEPH L. LENIHAN,
CLIFFORD T. COOMES,
JAMES W. HOELAND,
(Counsel of record on whom service is to be made)
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellant, Louisville and Nashville Railroad Company.

Due Date: July 17, 1970.

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 956

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

ORDER

This cause is before this three-judge court on the motion of plaintiffs and intervening plaintiffs, on mandate of the Supreme Court of the United States, issued January 5, 1970, in Nos. 101 & 102, Oct. Term 1969, *City of Chicago* v. *United States,* (1) to reinstate the temporary restraining order in case No. 68 C 1666 and (2) to remand cause No. 68 C 1666 to the Interstate Commerce Commission, upon grant of plaintiffs' motion for summary judgment in No. 68 C 956.

The court has considered the opinion of the Supreme Court of the United States and the mandate issued thereon, and being fully advised in the premises,

It is ordered that both causes numbered 68 C 956 and 68 C 1666 be remanded to the Interstate Commerce Commission for further hearings.

It is further ordered that the motion made herein to reinstate the restraining order in said cause No. 68 C 1666 be held under advisement until the Interstate Commerce Commission concludes its hearings and makes its report and enters a final order therein.

(s) WIN G. KNOCH
United States Circuit Judge

(s) J. SAM PERRY
United States District Judge

(s) EDWIN A. ROBSON
United States District Judge

Dated: Chicago, Illinois,
February 5, 1970.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 956

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970 entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Railroad Company ("C&EI") for rehearing or amendment of said order of February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion, and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that the L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> ". . . petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

"Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1-2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

"In *Missouri Pac. R. Co. Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company v. United States*, 263 F. Supp. 421, affirmed per curiam 385 U. S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route . . .*" (Emphasis supplied.)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate operation of the "Hum-

mingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to

the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

(s) WIN G. KNOCH
Circuit Judge

(s) J. SAM PERRY
District Judge

(s) EDWIN A. ROBSON
District Judge

Dated: Chicago, Illinois,
March 19, 1970.

APPENDIX C

28 U.S.C. § 2325

§ 2325. Injunction; three-judge court required:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970.

49 U.S.C. § 13a(1)

DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

SEC. 13a(1). A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or

constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that LOUISVILLE AND NASHVILLE RAILROAD COMPANY, one of the defendants in the above matter, does hereby appeal to the Supreme Court of the United States from the order entered in this proceeding on March 19, 1970, vacating and setting aside the orders of the Interstate Commerce Commission in Finance Dockets 24725 and 25047, consolidating the two proceedings and remanding them to the Interstate Commerce Commission, which order purports to be entered in conformity with the opinion of the Supreme Court, and for the purpose of carrying out its mandate.

The Clerk will please certify the record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

This appeal is taken pursuant to Title 28 United States Code, Sections 1253 and 2101(b).

Dated: April 17, 1970

PHILIP M. LANIER
JOSEPH L. LENIHAN
JAMES W. HOELAND
CLIFFORD T. COOMES
908 West Broadway
Louisville, Kentucky 40203

(s) HARRY R. BEGLEY
72 West Adams Street
Suite 1500
Chicago, Illinois 60603

Attorneys for Defendant, Louisville & Nashville Railroad Company.

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	No. 68 C 1666

AMENDMENT TO NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that LOUISVILLE AND NASHVILLE RAILROAD COMPANY, one of the defendants in the above matter, does also appeal to the Supreme Court of the United States from the order entered in this proceeding on March 19, 1970, reinstating the restraining order which would purport to re-establish the operation of the "Hummingbird" trains.

Dated: April 17, 1970

PHILIP M. LANIER
JOSEPH L. LENIHAN
JAMES W. HOELAND
CLIFFORD T. COOMES
908 West Broadway
Louisville, Kentucky 40203

(s) HARRY R. BEGLEY
72 West Adams Street
Suite 1500
Chicago, Illinois 60603
Attorneys for Defendant, Louisville & Nashville Railroad Company.

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Nos. 410

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,

Appellants,

vs.

CITY OF CHICAGO, et al.,

Appellees.

On Appeal From The United States District Court for the Northern District Of Illinois.

JURISDICTIONAL STATEMENT

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
135 South La Salle Street
Chicago, Illinois 60603
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

July 15, 1970

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

Nos.

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,

Appellants,

vs.

CITY OF CHICAGO, et al.,

Appellees.

On Appeal From The United States District Court for the Northern District Of Illinois.

JURISDICTIONAL STATEMENT

Appellant Chicago & Eastern Illinois Railroad Company ("C&EI") appeals from the judgment of the United States District Court for the Northern District of Illinois, setting aside an order of the Interstate Commerce Commission. The judgment was originally entered on February 5, 1970 but, on reconsideration, was vacated, amended, and modified on March 19, 1970. C&EI submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below[1]

The opinion of the District Court is contained in its orders of February 5, 1970 and March 19, 1970 (both unreported), copies of which are attached hereto as Appendices A and B respectively. Copies of the Interstate Commerce Commission's report and order authorizing discontinuance, reported in 331 I.C.C. 447, and of its unreported order denying reconsideration, are attached hereto as Appendix C.

Jurisdiction

Appellees brought this suit under 28 U.S.C. §1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court, originally entered on February 5, 1970, was vacated, amended, and modified on reconsideration on March 19, 1970; C&EI filed its notice of appeal in the District Court on April 17, 1970. A copy of C&EI's notice of appeal is attached hereto as Appendix D. The jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal is conferred by 28 U.S.C. §§1253, 2101(b), and 2325, and is sustained by *Southern Ry.* v. *North Carolina*, 376 U.S. 93 (1964), and *City of Chicago* v. *United States*, 396 U.S. 162 (1969).

Statutes and Regulations Involved

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1); the regulations of the Interstate Commerce Commission promulgated thereunder, 49 C.F.R. Part 1122 (1970 Ed.); and Section 2325 of the Judicial Code, 28 U.S.C. §2325, are set forth in Appendix E hereto.

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[1] This case is now before this Court for the second time. See p. 5, *infra*.

Questions Presented

1. Where a rail carrier, under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1), posts notices of a proposed discontinuance at all points along the route of the trains to be discontinued, and the Interstate Commerce Commission (in accordance with its consistent construction of the statute) expressly finds that such notice was proper and sufficient, may the District Court—without articulating the basis for its decision or the standards to be applied in the future and without considering the merits of the case—summarily reverse the Commission's interpretation of the statute, require the Commission to reopen its investigation and consolidate the case with one involving entirely different trains, and require the carrier to post notices in states it does not serve?

2. May the District Court summarily vacate an order of the Interstate Commerce Commission on grounds of allegedly insufficient notice, without considering the merits of that order, where the claimed insufficiency is not a jurisdictional defect and there is no showing that it prejudiced any party in any way?

Statement

Proceedings Before the Interstate Commerce Commission

On August 31, 1967, C&EI filed with the Interstate Commerce Commission, posted at all points served by the trains and in each car of the trains, and mailed to the Governors of Indiana and Illinois, the statutory notice of its intent to discontinue its interstate passenger trains Nos. 93 and 54, operating (one in each direction) between Chicago, Illinois and Evansville, Indiana. After an investigation and full hearings, the Commission concluded that the trains

should be discontinued and terminated its investigation. *Chicago & E.I.R.Co. Discontinuance of Trains*, 331 I.C.C. 447 (1968).[2] Appellees (the great majority of whom were parties to the Commission proceeding) then sought reconsideration, arguing for the first time that C&EI's failure to post notices in Kentucky, Tennessee, Georgia and Alabama —states served not by C&EI, but by trains of another railroad, the Louisville & Nashville ("L&N"), which connect with C&EI's trains at Evansville—deprived the Commission of jurisdiction. On May 15, 1968, the Commission rejected that argument (Appendix C, p. 35a), finding that C&EI "'gave the proper notice required,'" and denied reconsideration. On May 27, 1968, appellees commenced this action in the District Court.[3]

Proceedings in the District Court

The case in the court below, which never reached the merits, turned upon two motions, both argued on November 4, 1968: appellees' motion for summary judgment, which requested the District Court to remand the case to

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[2] The trains were accordingly discontinued on February 2, 1968, and have not operated since that time.

[3] Four months later, the Commission authorized discontinuance of two L&N trains operating between Cincinnati, Ohio and New Orleans, Louisiana, *Louisville & N.R.Co. Discontinuance of Trains*, 333 I.C.C. 720 (1968), and the Tennessee Public Service Commission, joined by appellees in the instant case, brought suit in the court below to review that order. The two cases were not consolidated (despite appellees' requests) until the District Court's order of March 19, 1970. For clarity, the instant case will occasionally be referred to hereafter as "the C&EI case," and its companion as "the L&N case." It should be noted that the trains involved in the L&N case do not even intersect with those involved here.

the Commission with instructions to dismiss for want of jurisdiction because of C&EI's allegedly insufficient notice, and C&EI's motion to dismiss the case on the ground that the Commission's order was not subject to judicial review.

On January 8, 1969, the District Court granted C&EI's motion to dismiss. *City of Chicago* v. *United States*, 294 F. Supp. 1103 (N.D. Ill. 1969). This Court reversed on direct appeal, in an opinion holding only that Commission orders discontinuing investigations under Section 13a(1) are judicially reviewable, and remanded the case to the District Court for further proceedings. *City of Chicago* v. *United States*, 396 U.S. 162 (1969). Without hearing argument and without explanation, the District Court thereupon issued an order (Appendix A) "that both cases numbered 68 C 956 [the C&EI case] and 68 C 1666 [the L&N case] be remanded to the Interstate Commerce Commission for further hearings."[4] It did not specify the nature of the "further hearings."

All parties sought reconsideration or clarification of that order. On March 19, 1970 the District Court—still without hearing argument—granted reconsideration, vacated its first order, and entered a new order consolidating the C&EI and L&N cases, requiring the Commission to consolidate the cases on remand, vacating the Commission's orders in both cases (which it had omitted to do in its first

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[4] The order was apparently based upon appellees' "Motion on Mandate of the Supreme Court," filed on January 7, 1970, which requested reinstatement of a temporary restraining order (dissolved a year previously) in the L&N case and sought remand of the L&N case to the Commission "upon grant of [appellees'] motion for summary judgment in [the C&EI case]." Both this order and that of March 19, 1970 purported to be in compliance with this Court's mandate on remand; but neither the mandate nor this Court's opinion could be said even to suggest the action taken by the District Court.

order), and remanding both cases to the Commission "for further proceedings in accordance with the statutes so made and provided." (Appendix B, p. 8a.) Again the court failed to specify the nature of the "further proceedings;" it did not even specify the statutes to which it referred. Its sole explanation for the order (*Id.*, p. 7a) was that in the C&EI case "the public did not receive adequate notice from the railroads or of the I.C.C. proceedings," and that remand of the C&EI case required remand of the L&N case because "only in a consolidated proceeding can a just and fair decision be reached." The court did not hold that the allegedly inadequate notice was a jurisdictional defect or that any party was in any way prejudiced thereby, nor did it suggest that the Commission's orders in either case were wrong on the merits. In neither case did the court ever entertain briefs or argument on the merits.

This appeal followed.

The Questions Are Substantial

As this Court recognized in *Southern Ry.* v. *North Carolina*, 376 U.S. 93, 100-04 (1964), Congress intended Section 13a of the Interstate Commerce Act, 49 U.S.C. §13a, as a partial remedy for a steadily worsening railroad situation. The eventual solution to the serious problems of rail passenger service, whatever form it may take, cannot be advanced by the decision below. The District Court's ruling, unsupportable on the merits, can only encourage attempts to set aside Interstate Commerce Commission orders on technical and uncertain grounds of "notice," grounds unrelated to the purpose of Section 13a, the merits of the Commission orders, or the fairness of the Commission hearings. Further, the decision below violates basic principles of judicial review by its sum-

mary rejection of the Commission's consistent interpretation of a technical provision of the Interstate Commerce Act, and fails either to set forth the reason for that rejection or to outline criteria for the conduct of future proceedings in this case or the interpretation of Section 13a(1) in other cases. The effect of the decision is to require every carrier seeking relief under Section 13a(1) to proceed at hazard, guessing at what notice is required and constantly facing the prospect of reversal of the Commission's decision, regardless of its merits, on the technical ground that notice should have been posted at additional locations. That cannot have been what Congress intended.

I.

The District Court's Decision Encourages Technical Attacks on Commission Orders. Furthermore, Its Failure to Articulate Standards For "Proper" Notice Provides Additional Encouragement For Such Attacks, And Leaves An Important Question of Statutory Interpretation Unsettled.

This case originally involved two trains (one in each direction), operated by one carrier (C&EI) between Chicago and Evansville, Indiana. Appellant, appellees, and the Commission so treated it. But having lost on the merits before the Commission, appellees, in their Petition for Reconsideration, sought to sidetrack the case by arguing—for the first time—that two other trains were involved, and that C&EI's failure to post and serve notices with respect to those trains (which are operated by L&N, not C&EI, and which run from St. Louis, Missouri to Atlanta, Georgia, connecting with C&EI's trains at Evansville) deprived the Commission of jurisdiction.[5] In accordance with its con-

[5] The connecting St. Louis-Atlanta L&N trains are not involved in this proceeding and are still in operation.

sistent interpretation of Section 13a(1), *Missouri Pac. R. Co. Discontinuance of Trains*, 320 I.C.C. 383, 385 (1964); *Southern Pac. Co. Discontinuance of Trains*, 317 I.C.C. 519, 520-22 (1962); *Chicago & E. I. R. Co. Discontinuance of Trains*, 331 I.C.C. 447, 448 (1968); 49 C.F.R. §§1122.5(e), 1122.5(j) (1970 Ed.), the Commission rejected the argument. Undaunted, appellees pressed their point before the District Court—apparently adding still another set of trains (those involved in the L&N case), which do not even intersect with C&EI's Chicago-Evansville trains.[6] More than two years after the Commission decided the case, and without once confronting the merits of its decision, appellees succeeded.

The District Court's order, barren of any indication of how it arrived at its conclusion or of what might constitute "sufficient" notice, is an open invitation to future technical afterthoughts in this and other cases. Even in this case, the confusion foreshadowed by the court's ruling is obvious from appellees' own apparent inability to decide whether notice should have been given on L&N's connecting trains only,[7] on those trains and on L&N's Cincinnati-New Orleans trains as well,[8] throughout "the entire complex of passenger operations centering at Evansville and

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[6] See note 8 and accompanying text, *infra*. A map showing the routes of the various trains in question is attached hereto as Appendix F.

[7] Memorandum in Support of Motion for Summary Judgment, pp. 6, 9.

[8] This is the import of appellees' insistence (and the court's ruling) that the C&EI and L&N cases should be consolidated and that remand of one requires remand of the other. But neither appellees' briefs and arguments on their motion for summary judgment, nor the District Court's orders, directly confront the question. Appellees' complaint, moreover, did not suggest that notice should have been posted on the Cincinnati-New Orleans trains.

at Nashville,"[9] or—as hinted in the District Court's second order (Appendix B, p. 7a)—"from Chicago to and throughout the Southeastern part of the United States." Certainly the District Court offers no guidance. The only two criteria it suggests (Appendix B, p. 7a), without indicating their source, are "vital interest" on the part of potential protestants (or "the general public interest"), and whether a given passenger service is "interwoven and entwined" between "various railroads"—tests so vague as to be meaningless.

Obviously, the question of what constitutes proper statutory notice arises in every Section 13a(1) proceeding. Since virtually every train provides connecting service with one or more other trains (not infrequently switching cars from one to another), if appellees' theories are accepted it will be a rare case in which objectors cannot raise a claim of defective notice. By rejecting the Commission's consistent interpretation of Section 13a(1) and by failing to articulate the standards for its decision or to fill the interpretative vacuum that decision creates, the District Court has fostered uncertainty and encouraged useless litigation, unrelated to the merits, in almost every Section 13a(1) case. These difficulties are reinforced by the court's failure to consider whether the allegedly defective notice prejudiced any party or in any sense affected the Commission's resolution of the real statutory issue (the balance between public need for, and burdensome operation of, the trains). The court's decision, by exalting form over substance and leaving the meaning of a crucial provision of Section 13a(1) unsettled, can only serve to retard the purposes of the Interstate Commerce Act.

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[9] Petition for Reconsideration, p. 4.

II.

The Decision of the District Court, However Interpreted, Is Wrong On The Merits.

It is elementary that the Commission's consistent interpretation of technical provisions of statutes it administers is entitled to great weight. Yet the District Court summarily overturned the Commission's consistent interpretation of Section 13a(1), giving no reasons and offering no alternative. It would seem, indeed, that the court simply substituted its own judgment for the Commission's as to the meaning of "train" in the Section 13a(1) notice requirements. That alone requires reversal. *Shields* v. *Utah Idaho Cent. R.R.*, 305 U.S. 177, 180-82, 185 (1938); *Nat'l Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Bass* v. *United States*, 163 F. Supp. 1, 4 (W.D. Va. 1958), *aff'd*, 358 U.S. 333 (1959).

A cursory inquiry, moreover, shows that the Commission's interpretation was right. Almost any Section 13a(1) case will involve connecting trains, operated under a wide variety of inter-railroad connecting service arrangements which often differ from each other only in highly technical details. Section 13a(1) itself does not speak to such arrangements, calling for notice only in "each state in which such train . . . is operated" and at "every station, depot or other facility served thereby." To the Commission, then, fell the task of regulation and interpretation. It chose to avoid entanglement in a morass of technicalities by requiring notice at all points on the carrier's own lines served by the train,[10] and—going beyond the bare language

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[10] This accords with the judicial interpretation of "served" in other contexts. Chicago & E. Ill. R.R. v. Illinois Cent. R.R., 261 F. Supp. 289, 299-301 (N.D. Ill. 1966); State of Georgia v. United States, 156 F. Supp. 711, 718 (N.D. Ga. 1957), *aff'd*, 356 U.S. 273 (1958).

of Section 13a(1)—to ensure notice to connecting as well as local passengers by requiring posting in each passenger car of the train to be discontinued, 49 C.F.R. §1122.5(j) (1970 Ed.). These rules are clear, comprehensible, calculated to provide actual notice, and easy to apply. But the District Court's interpretation (of which we know only that it sometimes requires notice somewhere beyond the carrier's own lines) upsets these rules, the product of the Commission's expert judgment, in favor of what can only become a wilderness of ex post facto case-by-case applications, turning on technicalities neither contemplated by Section 13a(1) nor required by the national transportation policy and leading to great uncertainty in the interpretation of the statute.

Finally, the District Court's summary reversal of the Commission's orders is unjustifiable, even if C&EI's notice was somehow insufficient and the court within the bounds of judicial review in so deciding. It is basic that Commission orders may not be upset unless unsupported by substantial evidence (as to which the burden of proof is upon the party complaining of the order) and that a reviewing court may not weigh the evidence. *Virginian Ry.* v. *United States*, 272 U.S. 658, 663 (1926); *Illinois Cent. R.R.* v. *United States*, 263 F. Supp. 421, 430 (N.D. Ill. 1966), *aff'd*, 385 U.S. 457 (1967). At no time did the District Court suggest that the Commission's orders were not supported by substantial evidence; indeed, at the court's sole hearing all parties agreed that the merits of those orders were not before it.[11] Yet it summarily vacated those orders.

Its sole reason for doing so—C&EI's allegedly insufficient notice—cannot support that result. For the court,

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[11] Transcript of Proceedings, November 4, 1968, pp. 26, 43, 46, 57. Appellees persistently urged the court to avoid considering the merits. See Motion for Separate Trials of Certain Issues and Memorandum in Support thereof, both filed with the Complaint.

quite correctly, rejected appellees' contention that the asserted insufficiency was a jurisdictional defect. Its orders nowhere mention jurisdiction, and it remanded the case to the Commission for "further proceedings," not, as appellees urged, with instructions to dismiss for want of jurisdiction. Indeed, it could hardly have done otherwise. Section 13a(1) provides that a carrier seeking discontinuance

> . . . may, but shall not be required to, *file with the Commission*, and upon such filing . . . *mail* to the Governor of each State in which such train . . . is operated, and *post* in every station, depot, or other facility served thereby, notice. . . . The carrier or carriers *filing* such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission. . . . Upon the *filing* of such notice the Commission shall have authority . . . to enter upon an investigation. . . . The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body . . . unless notice as in this paragraph provided is *filed with the Commission*. . . . (Emphasis added.)

Regardless of the question whether a particular notice is sufficient, this language makes it clear that the only "jurisdictional" notice is that which must be "filed with the Commission." On that notice, not on the notice "mailed" to Governors and "posted" in train stations, depends the Commission's jurisdiction, the supersession of State law, and the effectiveness of discontinuance. The legislative history of the statute—particularly the rejection by the House and the Conference Committee of the Senate's language[12] making mailing and posting, as well as filing, jurisdictional—supports this conclusion.

The District Court's decision, then, rests neither upon jurisdictional grounds nor upon the merits of the Com-

[12] See 104 Cong. Rec. 10861, 12560 (1958).

mission's orders. In reason, the only remaining basis for its summary reversal of those orders would be a finding that C&EI's allegedly insufficient notice prejudiced some or all of the parties. But such a finding requires a showing that interested parties were unaware of the Commission proceeding and thus denied an opportunity to participate therein, and at least some indication that the Commission was thereby prevented from receiving relevant evidence which might have affected its decision on the merits. *State of Montana* v. *United States*, 202 F. Supp. 660, 662 (D. Mont. 1962); *McCracken* v. *United States*, 47 F. Supp. 444, 446 (D. Ore. 1942); *State of New York* v. *United States*, 299 F. Supp. 989, 997 (N.D. N.Y. 1969), *aff'd*, 396 U.S. 281 (1970). The District Court made no such findings. It could not have done so without inquiring into the merits of the Commission's orders, which it did not do; the record, moreover, flatly negatives any finding of prejudice. Virtually all of the parties before the court appeared before the Commission, and no party has alleged that it did not have actual knowledge of the Commission proceedings, that any lack of formal notice caused it prejudice, or that the Commission did not receive and consider all relevant evidence. Whether the issue be "prejudice" or "substantial evidence," therefore, both the statute, 28 U.S.C. §2325, and this Court's decisions, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 136-38 (1947), unavoidably required the District Court on these facts to "hear and determine" the merits of the Commission's orders before overturning them. That it did not do.

Conclusion

The questions presented are substantial and of great importance to the proper application of Section 13a(1) and the proper functioning of the machinery for judicial review of Interstate Commerce Commission orders. For the reasons given herein, probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

135 South LaSalle Street
Chicago, Illinois 60603

July 15, 1970

APPENDIX A

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

CITY OF CHICAGO, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	)	No. 68 C 956
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	)	No. 68 C 1666

ORDER

This cause is before this three-judge court on the motion of plaintiffs and intervening plaintiffs, on mandate of the Supreme Court of the United States, issued January 5, 1970 in Nos. 101 & 102, Oct. Term 1969, *City of Chicago* v. *United States,* (1) to reinstate the temporary restraining order in case No. 68 C 1666 and (2) to remand cause No. 68 C 1666 to the Interstate Commerce Commission, upon grant of plaintiffs' motion for summary judgment in No. 68 C 956.

The court has considered the opinion of the Supreme Court of the United States and the mandate issued thereon, and being fully advised in the premises,

It is ordered that both causes numbered 68 C 956 and 68 C 1666 be remanded to the Interstate Commerce Commission for further hearings.

It is further ordered that the motion made herein to reinstate the restraining order in said cause No. 68 C 1666 be held under advisement until the Interstate Commerce Commission concludes its hearings and makes its report and enters a final order therein.

/s/ *Wm G. Knoch*
United States Circuit Judge
/s/ *J. Sam Perry*
United States District Judge
/s/ *Edwin A. Robson*
United States District Judge

Dated: Chicago, Illinois
February 5, 1970

APPENDIX B

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

CITY OF CHICAGO, et al., *Plaintiffs,*	)	
vs.	)	No. 68 C 956
UNITED STATES OF AMERICA, et al., *Defendants.*	)	
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,*	)	
vs.	)	No. 68 C 1666
UNITED STATES OF AMERICA, et al., *Defendants.*	)	

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970 entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Railroad Company ("C&EI") for rehearing or amendment of said order of

February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion, and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that the L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> "... petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

> "Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1-2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

> "In *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed per curiam 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route. . . .*" (Emphasis supplied)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the

Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate operation of the "Hummingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

/s/ Win G. Knoch
Circuit Judge
/s/ J. Sam Perry
District Judge
/s/ Edwin A. Robson
District Judge

Dated: Chicago, Illinois,
March 19, 1970.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, B. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson, Earl G. Quinn, Keith E. Roberts, J. H. Smith, and *George P. Sheahan* for various railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND STAFFORD

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of four months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No.

[1] By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Train Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles		Stations		Train No. 54 daily
P.M.					A.M.
3:45	C.J	Lv.	Chicago, Ill.	Ar.	10:35
3:59	6.6		Chicago (63rd St.)		10:21
A4:30	28.8		Steger	E	9:44
.....	77.5		Watseka	G	8:49
6:10	123.2		Danville		7:55
7:15	177.5		Terre Haute, Ind.		6:40
B7:45	203.7		Sullivan	G	6:11
8:18	234.7		Vincennes		5:40
D8:50	259.0		Princeton		5:05
9:55	287.2	Ar.	Evansville	Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly

assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches originating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal. Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta,

Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230, 225, and 176, respectively, of which 84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same

[2] Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470

due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-

of-pocket expenses of $1,001,950 for a net income of $94,-657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including car-hire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967,

when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the

equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 54
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-360 Passenger traffic[4]	21,996	16,036
Transportation:		
373 Station employees[4]	$15,650	$14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train engineman[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168

		Train No. 93	Train No. 54
400	Enginehouse expense—train[11]	8,108	8,108
401	Trainmen[10]	67,844	67,134
402	Train supplies and expenses[12]	88,308	88,308
403	Operating sleeping cars[4]	49,060	37,392
409	Employee health and welfare benefits[8]	5,163	5,222
	Insurance[13]	16,405	16,405
419	Loss and damage—baggage[14]	550	480
420	Injuries to persons[14]	41,044	2,754
441	Dining and buffet service[4]	71,188	71,188
General:			
452	Clerks, accounting[4]	9,142	8,438
456	Employee health and welfare benefits[4]	360	324
	All joint facility accounts[15]	170,720	170,720
532	Railway tax accruals[16]	21,958	21,542
	Total expenses	918,969	862,563

[1] 1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.

[2] Projected based on current traffic.

[3] Projected based on car assignments.

[4] Projected based on first 6 months 1967 expenses.

[5] Projected based on estimated car miles @ first 6 months 1967 cost per car mile.

[6] Based on two unit assignment.

[7] Based on cars required.

[8] Based on current G.M.A. rates applied to labor only.

[9] Based on current assignment.

[10] Based on 1966 payments plus wage increases.

[11] Based on 2 unit assignment @ first month 1967 cost per unit miles.

[12] Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.

[13] Based on current premiums.

[14] Based on 2.5 year average.

[15] Based on estimated car assignments.

[16] Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Milford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses de-

sire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 members who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The

mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time

record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or twice a year during inclement weather. Student ownership of automobiles by upperclassmen is permitted and some of the students use the trains only when they cannot obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west

thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United

States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplanes cut transport time tremendously for people, mail and express. The automobile and the super highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatic change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous problems flowing therefrom regarding rehabilitation of its

line and recovery of traffic. See *Missouri Pac. R. Co.-Control-Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger-use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not re-

quired by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

ORDER

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. Neil Garson,
Secretary

(SEAL)

APPENDIX A

Statement of revenues and expenses for trains Nos. 93 and 54 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 93	Train No. 54	Train No. 93	Train No. 54	Train No. 93	Train No. 54
Revenues:						
102 Coach (1)	$ 516,762	$ 480,139	$ 532,953	$ 468,549	$ 235,039	$ 197,355
102 First class (1)	90,032	122,097	87,680	113,593	33,431	45,172
103-108 Baggage & other (1)	1,606	493	2,270	1,153	2,970	1,315
106 Mail-RPO (1)	81,043	62,304	82,843	82,843	12,483	12,483
106 Mail-storage (1)	305,137	50,856	305,621	96,111	110,350	37,510
107 Express (1)	4,311	906	2,955	4,762	7,258	4,436
131 Dining & buffet (1)	45,876	45,875	47,844	47,844	18,910	18,910
Total Revenue	1,044,765	762,668	1,062,166	814,855	420,147	317,181
505-538 Car hire, net (1)	51,842	48,488	21,328	2,008	(280)	(5,900)
Total Income (2)	1,096,607	811,156	1,083,494	816,863	420,187	311,281
Total Expense (See below)	1,001,950	862,270	1,125,287	1,022,127	522,421	477,387
PROFIT OR (LOSS)	94,657	(51,114)	(41,793)	(205,264)	(102,234)	(166,106)
Maintenance of Equipment:						
311 Repairs, diesel locomotives (3)	54,497	54,897	70,299	70,959	26,703	26,695
317 Passenger-train cars-Repair (4)	89,300	72,511	174,853	163,022	75,937	70,864
331 Equip.Deprn.(52)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Deprn.(54)Pass.Cars(6)	36,051	35,739	59,211	58,431	28,498	27,882
335 Emp. H&W benefits (7)	2,354	2,175	2,916	2,841	1,299	1,250
Traffic:						
351-360 Passenger Traffic (8)	17,896	13,539	19,959	14,914	10,998	8,018
Transportation:						
373 Station employees (9)	67,445	26,764	64,723	29,276	24,154	11,641
376 Sta. supplies & exp. (10)	2,568	2,568	2,568	2,568	1,531	1,384
378 Yard Cond. & Brkmn. (11)	3,436	3,436	1,661	1,661	1,832	1,832
392 Train enginemen (1)	48,669	51,395	47,803	50,369	23,674	24,517
394 Train Fuel.(3)	58,187	58,614	46,150	46,583	18,407	18,401
397 Water for train Loco. (3)	1,506	1,517	2,486	2,510	1,078	1,078
398 Lubs. for train Loco. (3)	2,746	2,766	3,127	3,156	2,245	2,245
399 Other supplies for train loco. (3)	649	654	377	380	101	101
400 Enghse. expense train (3)	14,820	18,929	12,395	12,511	4,909	4,908
401 Trainmen (1)	61,163	61,861	64,651	65,937	29,278	29,201
402 Train supplies & exp. (12)	64,778	57,268	89,105	84,673	47,025	44,627
403 Operating sleeping cars (1)	44,199	49,385	41,171	31,561	24,530	18,696
409 Emps. H&W benefits (13)	7,727	6,134	6,394	5,508	2,459	2,468
insurance (1)	12,172	12,172	12,178	12,178	8,766	8,766
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & damage-baggage (1)	230	20	492	492	444	444
420 Injuries to persons (1)	78,350	2,375	22,782	2,593	17,000	1,647
441 Dining & buffet serv. (1)	69,161	69,161	76,839	76,839	33,594	33,594
General:						
452 Clerks, accounting (14)	13,566	13,464	10,972	10,292	4,571	4,129
456 Emps. H&W benefits (15)	580	576	429	404	180	162
All Joint Facility Accounts (16)	212,554	215,158	244,132	236,092	119,698	113,697
532 Ry. tax accruals (17)	24,350	20,196	29,631	25,381	16,992	10,622
TOTAL EXPENSES:	1,001,950	862,270	1,125,287	1,022,127	522,421	477,387

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car-miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue pro rata.
(9) Includes mail handlers, also C&EI station employees.
(10) Trains Nos. 93 and 54's portion of Danville depot expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 378, 392 and 401.
(14) Revenue pro rata of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Savable portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.I. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 331 through 360, 373, 378, 392, 401 and 452.

Service Date
May 15, 1968

Corrected Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance;

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, et al.,

Defendants.

Civil Action — No. 68 C 956

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Chicago & Eastern Illinois Railroad Company, one of the above-named defendants, hereby appeals to the Supreme Court of the United States from the order, entered in this action on March 19, 1970, consolidating this action with *Tennessee Public Service Commission, et al.* v. *United States of America, et al.*, N.D. Ill., Civil Action No. 68 C 1666, vacating the orders of the Interstate Commerce Commission theretofore entered in each action, and remanding both actions, as consolidated, to the Interstate Commerce Commission for further proceedings.

This appeal is taken pursuant to 28 U.S.C. §1253.

II.

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of

this Court is hereby requested to certify the entire record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

/s/ *Keith F. Bode*
Keith F. Bode
Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603

C&EI filed the foregoing Notice of Appeal in the United States District Court for the Northern District of Illinois on April 17, 1970, together with proof of service, and served copies upon all parties of record by mail on the same day.

APPENDIX E

Interstate Commerce Act. Title 49, United States Code: Section. 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may

require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

49 C.F.R., Part 1122 (1970 Ed.):

§ 1122.1 Scope of rules in this part.

The rules in this part govern the procedure to be followed by carriers subject to part I of the Interstate Commerce Act which, under and pursuant to the provisions of section 13a of said act, file with the Commission a notice under paragraph (1) of said section or a petition under paragraph (2) thereof with respect to a proposed discontinuance or change, in whole or in part, of the operation or service of any train or ferry.

§ 1122.2 Definitions.

As used in this part:

(a) The term "act" means the Interstate Commerce Act, as amended.

(b) The term "notice" means a notice as provided for in paragraph (1) of section 13a.

(c) The term "petition" means a petition filed with the Commission under the provisions of paragraph (2) of section 13a for authority to effect a discontinuance or change.

§ 1122.3 Form and style of notice.

The notice shall be reproduced by printing, multigraphing, or mimeographing (or by any other process provided the copies are clearly legible) on paper not less than 8½ by 11 inches, with the words, "Notice of proposed change (or discontinuance, if appropriate) of service" printed in large bold-face type near the top. If printed, nothing less than 12-point type shall be used in the remainder of the notice.

§ 1122.4 Contents of notice.

A separate notice shall be given for each discontinuance or change of service. A single notice may include more than one train or ferry except that unrelated trains or ferries shall not be made the subject of a single notice. Each notice shall set forth the following information:

(a) Exact corporate name and general office address of the carrier.

(b) The number and name or other description of the train or ferry with respect to which a discontinuance or change of operation or service is proposed, the name of each station, depot, or facility affected thereby, and the termini between which the train or ferry operates.

(c) The date on which the discontinuance or change of operation or service is proposed to become effective.

(d) Advice to the public that persons desiring to object to the proposed discontinuance or change should notify the Interstate Commerce Commission, at Washington, D.C., of such objection and the reasons therefor at least 15 days before the effective date of the proposed discontinuance or change.

§ 1122.5 Information required with notice.

With each notice of a proposed discontinuance or change of operation or service, there shall be filed with the Commission a "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" which, in the body thereof or in exhibits attached thereto and referred to therein, shall contain the following:

(a) Exact corporate name and general office address of the carrier proposing the discontinuance or change.

(b) Name, title, and post office address of counsel or officer to whom correspondence in regard to the notice should be addressed.

(c) Complete description of the present service of the train or ferry involved and of the discontinuance or change of operation or service proposed.

(d) Complete statement of the reasons for the proposed discontinuance or change of operation or service.

(e) The names of all railroads interchanging passengers or freight with the subject train or ferry, and the points of such interchange.

(f) Description of other common carrier service, including service of the subject carrier, of the same kind (passenger or freight) rendered by the trains or ferries involved, between and at the points described in the notice and other common carrier service available in the immediate territory.

(g) A statement of the traffic transported on trains or ferries involved for each of the last 2 calendar years and for the part of the current year for which such information is available. If information for such periods is not submitted, explanation must be given as to why such information was not submitted. When a notice involves more than one train or ferry, the traffic of each should be segregated to the extent practicable. If the proposed discontinuance or change involves less than all of the stations served by a train or ferry, to the extent such information is available segregation should be made of the traffic transported to and from each station which will be affected.

(h) Financial results of operating the trains or ferries involved during the period or periods embraced in the statement submitted pursuant to paragraph (g) of this section, segregated in the same manner and to the same extent as required by that paragraph.

(i) A copy of the carrier's general balance sheet statement as of the latest date available; and of its income statements for each of the last two calendar years and for that portion of the current year for which such information is available.

(j) A certificate that a copy of the notice and of the "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" has been mailed to the Governor and railroad regulatory body of each State in which the subject train or ferry is operated and that such notice has been posted in a conspicuous place in each station, depot, or other facility involved, including each ferry and each passenger car on trains affected, which certificate shall include information of the date or dates on which the notice and statement were mailed and the date or dates on which the notice was posted as aforesaid and that a copy of the notice and statement were served upon the Assistant Postmaster General, Bureau of Transportation and International Services, Washington, D.C. 20260 and the Railway Labor Executives' Association, Washington, D.C. 20001.

(k) Map showing the geographic situation of the line over which the train operates, or, if a ferry, the route traversed. The map should show the line or route clearly, by color or otherwise, and the stations thereon, on a sheet not smaller than 8½ x 11 inches. Three copies of the map should be submitted unbound for use of the Commission, in addition to those attached to the statement.

§ 1122.6 Petition.

Petitions for authority to effect a discontinuance or change of the operation or service of a train or ferry shall contain in the body thereof or in exhibits attached thereto and referred to therein, the information required by paragraph (b) of § 1122.4 of this part, that required by §1122.5 excepting paragraph (j) thereof, and in addition the following:

(a) The date on which the petition or application for discontinuance or change in the operation or service of the train or ferry was filed with the appropriate State authority.

(b) Identification of the State authority with which such petition or application was filed.

(c) Description of the action, if any, taken by such State authority on the petition or application filed with it.

(d) To be filed only with the original of the petition to the Commission, copy of the record made before the State authority, including copies of the application or petition to it, transcript of any oral hearing, and decision and order, if any.

§ 1122.7 Execution.

The original copy of the statement required by § 1122.5 and of a petition as described in § 1122.6 shall be signed in ink by an executive officer of the carrier having knowledge of the matters and things therein set forth. Persons signing the statement or petition shall also sign a certificate in form as follows:

..... hereby certifies that he is the
(Name)

..... of the .....
(Title)

..... petitioner
(Corporate name of petitioner)

herein; that he has been authorized by proper corporate action on the part of said petitioner, or by the proper court, to execute and file with the Interstate Commerce Commission the foregoing statement (or petition); that he has carefully examined all of the statements referred to in said statement (or petition) and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein; and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

.....
(Signature)

Dated this ..... day of ....., 19.....

§ 1122.8 Filing; copies.

As applicable, 8 copies of the notice and an original and 7 copies of the accompanying statement, or an original and 7 copies of the petition shall be filed with the Secretary of the Commission, Washington, D.C. Each copy of the statement or petition shall bear the dates and signatures that appear in the original and shall be complete in itself; but the signatures in the copies may be stamped or typed.

Judicial Code, Title 28, United States Code:

Section 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX F

C&EI Trains 93 and 54 ————————

L&N Connecting Trains — — — — — — (*)

Trains Involved in the L&N Case —| —| —| —|


Chicoutimi
NEW BRUNSWICK
MAINE
QUEBEC
FREDERICTON
Saint John
Port Arthur
Ft. William
Sault Ste. Marie
Sudbury
Hibbing
Duluth
Superior
WISCONSIN
Iron Mountain
MICH
Marquette
Escanaba
OTTAWA
CANADA
Montreal
Hull
Sherbrooke
Granby
Rangor
AUGUSTA
Portland
VT.
N.H.
Burlington
MONTPELIER
Waterbury
Watertown
NEW YORK
Utica
Schenectady
ALBANY
Rochester
Syracuse
Auburn
Binghamton
Elmira
Jamestown
Buffalo
TORONTO
Hamilton
London
Port Huron
Sarnia
Saginaw
Bay City
Grand Rapids
Muskegon
Lansing
Kalamazoo
Jackson
Detroit
Windsor
MICHIGAN
Traverse City
Alpena
Lake Michigan
Green Bay
Appleton
Oshkosh
Fond du Lac
Milwaukee
Racine
Kenosha
Waukegan
Chicago
Gary
South Bend
Elkhart
Toledo
OHIO
Akron
Canton
Cleveland
Youngstown
Erie
Pittsburgh
Johnstown
Harrisburg
PENNSYLVANIA
Williamsport
Wilkes Barre
Scranton
Reading
Allentown
Philadelphia
Camden
Wilmington
Atlantic City
TRENTON
New York
HARTFORD
Springfield
Worcester
BOSTON
PROVIDENCE
Newport
Atlantic Ocean
Rochester
Mason City
Dodge City
Waterloo
Dubuque
Cedar Rapids
Davenport
Rock Island
Galesburg
Peoria
Bloomington
Decatur
Springfield
Quincy
Hannibal
St. Joseph
Kansas City
Lawrence
Sedalia
JEFFERSON CITY
St. Louis
E. St. Louis
Alton
Joplin
Springfield
Cape Girardeau
ARKANSAS
Jonesboro
Jackson
Memphis
Muskogee
Ft. Smith
LITTLE ROCK
Alester
Hot Springs
Texarkana
El Dorado
Greenville
LOUISIANA
Vicksburg
Meridian
Tyler
Shreveport
Monroe
JACKSON
Alexandria
Hattiesburg
BATON ROUGE
Beaumont
Lake Charles
New Orleans
Port Arthur
Galveston
Gulf of Mexico
Danville
Terre Haute
Covington
INDIANAPOLIS
Cincinnati
Portsmouth
Louisville
Ashland
Lexington
Hazard
KENTUCKY
Bowling Green
Middlesboro
Paducah
Hopkinsville
Cairo
TENNESSEE
NASHVILLE
Knoxville
Johnson City
Bristol
Kingsport
Hurtington
CHARLESTON
Bluefield
Roanoke
Lynchburg
Petersburg
Clarksburg
Parkersburg
Marietta
Zanesville
Newark
COLUMBUS
Springfield
Dayton
Lima
Marion
Wooster
Canton
Akron
Lorain
Toledo
Elkhart
Gary
Kokomo
Muncie
Danville

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 17 1970
JOHN F. DAVIS, CLERK

Nos. 386, 387, 396 and 410

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

CITY OF CHICAGO, et al., *Appellees*.

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellant*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 410

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,

v.

CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

(Names of counsel appear inside front cover)

August, 1970

Washington, D. C. - [illegible]

Of Counsel:

MATHIAS M. MATTERN
511 City Hall Building
Chicago, Ill. 60602

J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61832

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

ANTHONY HASWELL
2517 N. Burling
Chicago, Ill. 60614

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, Jr.
801 Busseron Street
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Building
Henderson, Ky.

WILLIAM F. BLACK
CARL L. EVANS
State Office Building
Montgomery, Ala. 36102

CARL E. VanDORN
807 State Office Building
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg. - Rm. 1105
Jackson, Miss. 39201

SHELDON A. TAFT
GERALD P. WADKOWSKI
111 N. High Street
Columbus, Ohio 43215

RICHARD L. CURRY
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
Cordell Hull Building
Nashville, Tenn. 37219

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Building
Nashville, Tenn. 37201

EDWARD J. HICKEY, Jr.
WILLIAM J. HICKEY
620 Tower Building
Washington, D.C. 20005

ARTHUR K. BOLTON
HAROLD N. HILL, Jr.
JOHN W. HINCHEY
132 State Judicial Building
Atlanta, Ga. 30334

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La. 70112

CHESTER L. RIGSBY
State Office Building
Frankfort, Ky. 40601

LEON M. DESPRES
77 W. Washington
Chicago, Ill. 60602

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036

Attorneys for Appellees

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CITY OF CHICAGO, et al., *Appellees*.

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellant*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 410

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,

v.

CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees City of Chicago, Tennessee Public Service Commission, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of

Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Indiana Public Service Commission, Georgia Public Service Commission, Alabama Public Service Commission, Mississippi Public Service Commission, Kentucky Railroad Commission, State of Louisiana, Public Utilities Commission of Ohio, Railway Labor Executives' Association, Maurice F. Radrizzi (United Transportation Union), United Transport Service Employees (AFL-CIO), and National Association of Railroad Passengers, move that the judgment of the district court be affirmed.

STATEMENT

These are four appeals from a final judgment of a three-judge district court, setting aside orders of the Interstate Commerce Commission involving the "Georgian-Hummingbird" passenger train service of the Louisville & Nashville Railroad Company (L&N),[1] remanding the proceedings to the Commission, and reinstating the restraining order barring discontinuance of the "Hummingbird".[2] The judgment was entered upon reserved issues, together with subsequent proceedings, following remand last term in *City of Chicago v. United States*, 396 U.S. 162.[3]

---

[1]The appellant in No. 410, Chicago & Eastern Illinois Railroad Company, sold its Chicago, Ill.-Evansville, Ind. line to L&N on June 5, 1969, as contemplated in *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), affirmed sub nom. *Illinois Central Railroad Company v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd *per curiam* 385 U.S. 457 (1967). We are at a loss to explain C&EI's continued participation in this passenger train proceeding. See also: *Louisville & N.R. Co.-Pur.-Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968) and *Louisville & N.R. Co.-Trackage Rights*, 334 I.C.C. 412 (1969).

[2]The "Hummingbird" was abruptly discontinued in mid-run at Birmingham, Ala., discharging its passengers. For an account of this event, see the weekly *Traffic World*, Vol. 137, No. 3, at p. 45 (Jan. 18, 1969).

[3]The prior district court opinions are reported at 294 F. Supp. 1103, 1106. The instant order is not reported.

The judgment below involved two actions which were consolidated. The appeals in Nos. 386 and 410 concern the discontinuance by Chicago & Eastern Illinois Railroad Company (C&EI) of its segment of the "Georgian" passenger train. The "Georgian" was jointly operated by C&EI and L&N between Chicago, Ill. and Atlanta, Ga., C&EI transporting the train between Chicago, Ill. and Evansville, Ind. (287 miles), and L&N between the latter point and Atlanta, Ga. (444 miles). The "Georgian" connects at Nashville, Tenn. (159 miles below Evansville) with the "Hummingbird", the latter train being operated by L&N between Cincinnati, Ohio and New Orleans, La. Coaches and sleepers are transferred between the two trains at Nashville. Thus passengers may board the "Georgian" at Chicago in the early evening and arrive the following morning at Birmingham, Ala. on the "Hummingbird", whereas passengers destined for Atlanta, Ga. would continue on the "Georgian".

C&EI filed a notice with the Commission that it would discontinue its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind. Notice was not served upon the Governors of Kentucky, Tennessee, Alabama or Georgia; notice was not posted at stations south of Evansville, Ind.; and the notice as posted specified only "Trains Nos. 93 & 54", making no mention of the through-route nature of the train. After hearings in Illinois and Indiana, the Commission allowed discontinuance of C&EI's segment by report entered January 25, 1968. 331 I.C.C. 447. Certain protestants petitioned for reconsideration, maintaining that the carrier had not effectively-invoked the jurisdiction of the Commission. The Commission initially ruled in protestants' favor by dismissing the entire proceeding for failure of C&EI to effectively-invoke the Commission's jurisdiction. (App. A) However, the order on reconsideration, issued May 15, 1968 at 9:30 a.m., was replaced by a so-called "corrected order" served at 3:00 p.m. the same day. The "corrected order" denied reconsideration in all respects. (App. B) Plaintiffs instituted their action to set aside the "Georgian" decision on May 27, 1968 in the court below.

The appeals in Nos. 387 and 396 involve the "Hummingbird" train between Cincinnati, Ohio and New Orleans, La. When C&EI was permitted by the Commission to discontinue its Chicago-Evansville segment of the "Georgian", L&N posted notice that it would discontinue the "Hummingbird", stating to the Commission that the C&EI discontinuance resulted in the loss of the bulk of the passenger business on the "Hummingbird.":

> "On February 1, 1968, the Chicago and Eastern Illinois Railroad Company discontinued its passenger trains Nos. 93 and 54 between Chicago, Illinois and Evansville, Indiana, which connected with the L&N passenger trains operating between Evansville, Indiana and Atlanta, Georgia. These latter trains also carried passengers traveling between Chicago, Illinois, stations on the C&EI intermediate to Evansville, Indiana and stations on the L&N served by Nos. 6 & 7 between New Orleans and Nashville, Tenn. The discontinuance of said C&EI trains resulted in the immediate loss of the bulk of the passenger business handled on trains Nos. 6 & 7 between New Orleans and Cincinnati."

The Commission on September 3, 1968 entered its report allowing the discontinuance of the "Hummingbird" over its run between Cincinnati, Ohio and New Orleans, La. 333 I.C.C. 720. The Commisison in its decision took note of the then-pending judicial review proceedings involving C&EI's discontinuance of its segment of the "Georgian", and stated that developments in the "Georgian" case might change the picture for the "Hummingbird." (No. 387, J.S., pp. 32-33) Plaintiffs instituted an action for judicial review of the "Hummingbird" on September 6, 1968 in the court below, and secured a restraining order against discontinuance of the train.

The "Georgian" and "Hummingbird" cases were both argued together on November 4, 1968. The complete agency records were lodged with the court at that argument. Plaintiffs moved for summary judgment in the "Georgian" case,

maintaining that all stations on the line between Evansville, Ind. and Atlanta, Ga. should have been posted, and each of the Governors served with the notice. Plaintiffs argued for summary remand of the "Hummingbird" on the face of the report, and requested consolidation. C&EI and L&N moved for dismissal of both actions for lack of subject-matter jurisdiction.

The court below dismissed both actions, expressly reserving decision on all other questions. The restraining order against discontinuance of the "Hummingbird" was dissolved. 294 F. Supp. 1103, 1106. This court reversed. *City of Chicago v. United States*, 396 U.S. 162. During the course of the case here last term, L&N attempted to discontinue the remaining segments of the "Georgian". In denying discontinuance, the Commission set forth the history of this litigation. 336 I.C.C. 81 at 84-86. The Commission's report is set forth herein as Appendix C.[4]

The court below found on remand that in the proceedings before the Commission relating to the discontinuance of C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the Commission proceedings; and, further, although the residents of the area south of Evansville, Ind. were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the Commission, no notice was given them beforehand. (No. 386, J.S., p. 15) The interrelated proceedings were consolidated, and remanded to the Commission. The status quo which existed on September 6, 1968 was ordered restored, and the "Hummingbird" restraining order was reinstated. A stay of the order reinstating the "Hummingbird" was requested by

[4]The Commission's order required continued operation for a period of six months from December 3, 1969, or to and including June 3, 1970. L&N on June 4, 1970, filed a new section 13a(1) notice, and the Commission has instituted a new investigation. Finance Docket No. 26221. A decision is anticipated on or about November 6, 1970, when the interim four-month continuance order will expire. Public hearings were concluded August 14, 1970 at Atlanta, Ga.

L&N and by the Commission, which was granted by this Court on April 3, 1970, Mr. Justice Douglas dissenting. These appeals followed.

ARGUMENT

These appeals present no issue warranting plenary consideration by the Court, as the questions are manifestly unsubstantial. The Government expressly concedes that its separate appeal from the "Hummingbird" portion of the judgment may not warrant plenary review. (No. 387, J.S., pp. 6-7)[5] L&N's claim that the order reinstating the "Hummingbird" lacks "findings" and is a mandatory injunction, ignores the findings of the opinion itself, as well as L&N's pledge to restore the train if plaintiffs were successful in their appeals last term. (No. 386, J.S., pp. 13-15)[6] The carrier's further contention that the federal judiciary lacks power to grant injunctive relief in passenger discontinuance cases is without merit.[7]

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[5] The Government's contention that the "Hummingbird" discontinuance is justified apart from the "Georgian" (No. 387, J.S., pp. 5-6), is simply at variance with the face of the Commission's decision in the "Hummingbird" case, (No. 387, J.S., pp. 32-33), as well as contrary to the express interrelationship noted by the agency in its "Georgian" report. (No. 386, J.S., p. 27) See also Appendix C hereto, 336 I.C.C. at 84-86. Moreover, the Government in the court below did not oppose plaintiffs' request in January, 1970, for summary remand of the "Hummingbird" in the event remand was granted for the "Georgian."

[6] A party taking action in the face of and with knowledge of requests for injunctive relief is subject later to restoration of the status quo. *Texas & N.O. R.R. v. Northside Ry.*, 276 U.S. 475, 479; *Porter v. Lee*, 328 U.S. 246, 251; *Porter v. Warner Co.*, 328 U.S. 395, 399. Moreover, although the court need not make findings in summary judgment proceedings, F.R. Civ. P. 52(a), it did so here.

[7] L&N analogizes section 13a(1) with section 15(7) of the Interstate Commerce Act, 49 U.S.C. 13a(1), 15(7), citing *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658. However, *Arrow* is strictly confined to the peculiar legislative history behind the freight rate suspension power. It applies to no other statute. 372 U.S. at 666, fn. 13. Moreover, *Arrow* is only applicable to situations prior to the entry of an agency order on the merits. Here, the C&EI and L&N orders

C&EI's discontinuance of its portion of the "Georgian" train, which portion originated in Chicago and operated in the States of Illinois and Indiana, is the heart of the matter; for in eliminating access to and from Chicago, the basic railroad passenger structure in the Southeast – embracing also the States of Missouri, Kentucky, Tennessee, Ohio Alabama, Georgia, Mississippi, and Louisiana–has virtually collapsed.

1. The Government's contention that the Commission may properly allow one railroad, transporting a train in through service with another railroad, to separately invoke the provisions of section 13a(1) without giving notice to the public in the area served by the entire run of the train, is contrary to the statute and contrary to elementary fairness.[8] The Government asserts that the statutory scheme of section 13a, by providing a railroad with the option of having the Commission, rather than the State agencies, pass upon discontinuance proposals, suggests that the Commission should replace State agencies only to the extent that they could have defeated a carrier's attempt to discontinue a train. Accordingly, since C&EI could have proceeded unilaterally to the Illinois and Indiana agencies, the Government urges that there should be no requirement in section 13a(1) as to notice in States which had no regulatory power over C&EI. (No. 386, J.S., pp. 7-8)

The Commission's construction of the statute is unsettled and of recent origin. The C&EI decision constituted the first final order of the Commission on the point.[9] More-

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were both administratively final in every sense. There is nothing in the legislative history of section 13a to suggest a limitation on the judiciary. Congress was concerned with limiting the *Commission's* interim relief to a maximum four month period.

[8] A number of complaints were filed with the Commission by residents in the South who had received no notice of the C&EI discontinuance. See Appendix to Nos. 101 & 102, Oct. Term, 1969, at pp. 82-87.

[9] A different three-judge panel in the Northern District of Illinois, on June 4, 1970, set aside the Commission's piecemeal and disjointed handling of the "California Zephyr", operated by three railroads be-

over, where a single railroad seeks to discontinue only a portion of a passenger run, the agency has ruled that all stations and Governors over the run must be given notice, even that segment of the operation not proposed for discontinuance. *Chicago, M., St. P. & P.R.R. Co. Discontinuance of Trains*, 317 I.C.C. 761, 771-73.

The basic premise of the Government is contradicted by the legislative purpose and statutory language. One of the principal evils to which section 13a was directed was "the prior confused and time-consuming procedure under which the States supervised the discontinuance of passenger trains." *City of Chicago v. United States*, 396 U.S. at 164-65. Piecemeal discontinuances by State agencies were of primary concern to the Congress. Senator Bricker, one of the floor leaders, stated:

> "Mr. Bricker: Confusion arises when a railroad has, let us say, four trains running between Columbus, Ohio, and Indianapolis, Ind. Ohio might permit the railroad to take off 1 train, running at 10 a.m. and Indiana might permit the railroad to take off 1 train running at 2 p.m. But in that event the railroad would have to continue the operation of all of them in order to meet the requirements of the local and State groups. That situation has led to interminable delay and confusion which would be relieved as a result of enactment of the pending bill in that then the railroads would appeal to the Interstate Commerce Commission." (104 Cong. Rec. 10842)

Senator Smathers stated:

> "Mr. Smathers: What happens? The Public Utilities Commission of New York will approve the discontinuance of trains numbered 1, 6 and 12. The Public Utilities Commission of Pennsylvania will approve the discontinuance of trains numbered 2, 9, and 13.

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tween Chicago, Ill. and San Francisco, Calif. The Commission and the United States have noticed appeals to this Court from that decision. Nos. 70 C 585 & 689, *City of Chicago v. United States* (Kerner, C.J., Will and Parsons, D.J.J.).

> The Public Utilities Commission of Delaware will approve the discontinuance of trains numbered 16, 19, and 8. They are never the same trains; with the result that, while the record of the public utilities commission is pretty good with respect to the number of applications they have granted, those trains are still operating. Why? Because the railroad cannot get the public utilities commissions to agree on the same trains." (104 Cong. Rec. 10851)

The Commission's construction of section 13a(1) would continue, at the federal level, the very same segmented evaluation of passenger trains which Congress sought to avoid by enactment of the legislation. Yet the National Transportation Policy is directed "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 49 U.S.C. preceding section 1. Accordingly, the Commission is mandated to examine the overall national interest in coordinated service. It cannot close its eyes to the complete train service, and serve as a mere substitute for an individual State agency. This court has emphasized that a federal standard applies to interstate train discontinuances. *City of Chicago v. United States*, 396 U.S. at 165.

The language of section 13a(1) is consistent with the legislative purpose of having the Commission examine the overall public public interest in passenger service, which overall view must embrace notice to, and the testimony of the affected public. A three-judge court recently struck down the Commission's interpretation of the statutory language of section 13a(1) on this point:

> "The Interstate Commerce Commission and the defendants interpret Section 13a(1) as only requiring each individual railroad to notify the Governors of the states in which it operates and each railroad may proceed under Section 13a(1) independently of the other railroads which together make up an entire train. *Southern Pacific Co. Discontinuance of Trains-*

Ogden, Utah, and Oakland, California, 333 I.C.C. 525 (1968). The Commission's interpretation is based on the concept that "train" as used in Section 13a(1) means one that is operated by one railroad between two or more states. It is our opinion that such interpretation is in direct conflict with the literal language of the statute.

"The statute begins "A carrier or carriers . . . (whose) . . . rights with respect to the discontinuance . . . of the operation . . . of any (interstate) train . . . are subject to any provision of the constitution or statutes of any State . . . may . . . file with the Commission and . . . mail to the Governor of each State in which such train is operated . . ." The logical reading of this statute is that more than one carrier can be a part of a single "train", otherwise the plural "carriers" would have no meaning. The Commission claims that such interpretation negates the policies behind the Transportation Act of 1958 in enacting Section 13a(1). Section 13a(1) was enacted in order that railroads would no longer have to obtain separate permission from each state regulatory agency in seeking to discontinue passenger trains and thereby avoid both the lack of uniformity and the long delay involved in such a procedure. The purpose of Section 13a(1) was to shift the venue from the state regulatory agencies to the Interstate Commerce Commission and at the same time permit the states involved to present their objections to the Commission. See *New Jersey v. New York, Susquehanna & Western Railroad Co.*, 372 U.S. 1 (1963)." *City of Chicago v. United States* (No. 70 C 585 & 689, N.D. Ill.-E.D., 6/4/70).

We agree with the Government that section 13a(1) is an optional statute. Section 13a(1) does not directly pre-empt State jurisdiction. A railroad has the option of proceeding to the States rather than to the Commission. But the mere fact that section 13a(1) is an optional statute does not mean that the federal agency is simply to act in the stead of the State authority. A railroad electing the greatly expedited federal procedure must comply with federal standards and with federal criteria. If C&EI wishes to enjoy the rapid and

expedited federal procedures, then notice must be given to the public and to all Governors in the areas served by the train.[10]

The court below correctly held that the notice given did not comply with the statutory requirements.

2. The district court took note of the action of the Commission in awarding C&EI's Chicago-Evansville line to L&N, rather than to Illinois Central Railroad Company, one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N routes. (No. 386, J.S., p. 14) That decision, sustained by the Supreme Court, provides an independent basis for affirming the judgment below. See: *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 at 298, 301, 332, 338, 361-62; *Illinois Central Railroad Company v. United States*, 263 F.Supp. 421, aff'd 385 U.S. 457 (1967); and 336 I.C.C. 81 at 84-86, attached hereto as Appendix C, at pp. 4-6.

L&N, having acquired C&EI's Evansville line, is responsible for the passenger service findings relied upon by the Commission in awarding the line to it. Yet after securing approval in January, 1967, the carrier in June, 1967 commenced Commission proceedings aimed at termination of the "Georgina-Hummingbird" service. 336 I.C.C. 81 at 84-86 (App. C, pp. 4-6).

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[10] C&EI, throughout its jurisdictional statement, assails the decision below for failure to specify the line or lines of route over which notices should be posted in the remanded proceedings. The contention is without merit since by consolidating the proceedings, the complete "Georgian" and "Hummingbird" routes would be before the Commission. Moreover, L&N's acquisition of the C&EI properties in June, 1969, renders unnecessary any separate C&EI notice. As noted, fn. 1, *supra*, we today fail to understand any C&EI interest in these proceedings.

CONCLUSION

For the reasons stated, we submit that the judgment of the district court should be affirmed.

Respectfully submitted,

RICHARD L. CURRY
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
Cordell Hull Building
Nashville, Tenn. 37219

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Building
Nashville, Tenn. 37201

EDWARD J. HICKEY, Jr.
WILLIAM J. HICKEY
620 Tower Building
Washington, D.C. 20005

ARTHUR K. BOLTON
HAROLD N. HILL, Jr.
JOHN W. HINCHEY
132 State Judicial Building
Atlanta, Ga. 30334

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La. 70112

CHESTER L. RIGSBY
State Office Building
Frankfort, Ky. 40601

LEON M. DESPRES
77 W. Washington
Chicago, Ill. 60602

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036

Attorneys for Appellees

Of Counsel:

MATHIAS M. MATTERN
511 City Hall Building
Chicago, Ill. 60602

J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61832

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

ANTHONY HASWELL
2517 N. Burling
Chicago, Ill. 60614

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, Jr.
801 Busseron Street
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Building
Henderson, Ky.

WILLIAM F. BLACK
CARL L. EVANS
State Office Building
Montgomery, Ala. 36102

CARL E. VanDORN
807 State Office Building
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg. - Rm. 1105
Jackson, Miss. 39201

SHELDON A. TAFT
GERALD P. WADKOWSKI
111 N. High Street
Columbus, Ohio 43215

August 1970.

APPENDIX A SERVICE DATE MAY 15, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5(j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance; and

It further appearing, That applicant in the above-titled proceeding failed to give the proper notice required, as described above, in that no notice was posted in those facilities along the through route of trains Nos. 93 and 54 south of Evansville, Ind., and the notice as posted contained no mention of the through-route nature of the trains south of Evansville; and that applicant therefore has not effectively invoked the jurisdiction of this Commission in the above-titled proceeding;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition, insofar as it seeks dismissal of the above-titled proceeding for failure to invoke this Commission's jurisdiction under section 13a(1), be, and it is hereby, granted, and in all other respects is denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

(SEAL)

SERVICE DATE
MAY 15, 1968

APPENDIX B

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.— DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain

requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5(j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance.

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested:

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

(SEAL).

Served December 12, 1969

F-9558

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 25765

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 3 AND 4 BETWEEN ATLANTA, GA., AND EVANSVILLE, IND., AND TRAINS NOS. 5 AND 10 BETWEEN EVANSVILLE AND ST. LOUIS, MO.

Decided December 3, 1969

Upon investigation, found that continuance of operation by the Louisville and Nashville Railroad Company of service by its passenger trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and its passenger trains Nos. 5 and 10 between Evansville, Ind., and St. Louis, Mo., is required by the public convenience and necessity and continued operation will not unduly burden interstate commerce. Operation ordered for a period of 6 months from the date hereof. Investigation discontinued.

F. Wesley Bowers, Clifford T. Coomes, Tyree B. Harris, Joseph L. Lenihan, W. Rhett Tanner, and *Ralph D. Walker* for Louisville and Nashville Railroad Company.

J. Fred Parker for Georgia Public Service Commission, *Carl E. Van Dorn* for State of Indiana, and *Eugene W. Ward* for Tennessee Public Service Commission, protestants.

David L. Stanley for city of Carmi, Ill., *Bernard Rane, Raymond F. Simon* and *Mathias M. Mattern* for city of Chicago, Ill., *Demetri Hassakis* for city of Mt. Vernon, Ill., *Robert S. Matthews* for city of Evansville, Ind., and *Albert W. McCallister* for village of Enfield and county of White, Ill., protestants.

Gordon P. MacDougall for passenger association, protestant.

W. E. Cobble, Gordon E. Cox, S. G. Davenport, B. L. Dresbach, Thomas J. Duggan, L. G. Freeman, Joe Hester, Richard H. Kraushaar, George B. Lee, Tom McNeal, Maurice F. Radrizzi, Robert P. Reynolds, Mack P. Rice, Henry Risner, Keith E. Roberts, D. M. Schmitt, W. R. Selby, George P. Sheahan, A. L. Shepherd, Harry T. Smith, J. H. Smith, W. C. Spencer and *G. I. Winn, Jr.*, for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, DEASON, AND HARDIN

HARDIN, *Commissioner:*

On July 9, 1969, Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the Interstate Commerce Act, filed two separate notices and a single supporting statement pursuant to the provisions of section 13a(1) of the act proposing to discontinue operation on August 13, 1969, of its (1) passenger trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., a distance of 444 miles, and (2) passengers trains Nos. 5 and 10 between Evansville and St. Louis, Mo., a distance of 165 miles, or a total distance of 609 miles.

Upon consideration thereof and of a petition filed July 25, 1969, by the National Association of Railroad Passengers (NARP), requesting the carrier's notice be rejected for lack of jurisdiction, and protests filed by the association, various communities, individuals, labor organizations and State regulatory agencies, the Commission, division 3, by order entered July 30, 1969, instituted an investigation of the proposal embracing the issues raised by the petition, and ordered continued operation of the trains for a period not to exceed 4 months beyond the date when the proposed discontinuance would otherwise become effective. Because of the statutory limitation upon the time available for investigation and decision, the order provided that hearings would be held, for the omission of a report and recommended order by the hearing examiner, and for certification of the record to us for initial decision. Pursuant to a later order, duly posted in stations served by the trains, public hearings were held at St. Louis, Carmi, Ill., Evansville, Hopkinsville, Ky., Nashville and Chattanooga, Tenn., and Dalton, and Atlanta, Ga., between September 24 and October 7, 1969, inclusive. Briefs have been filed.

As previously indicated, NARP in its petition requests rejection of the notices filed by L&N on the grounds that the carrier failed effectively to invoke the Commission's jurisdiction pursuant to section 13a(1) of the act in that the wording of the certificate of posting does not indicate whether both notices, i.e., the notice concerning trains Nos. 3 and 4, and the notice concerning trains Nos. 5 and 10, were in fact posted at all stations served by the trains between St. Louis and Atlanta, that neither notice sets forth the

fact that the subject trains Nos. 3-5 and 4-10 are single trains between Atlanta and St. Louis, that L&N has split its trains into two sections for the purpose of giving notice, and that even if both notices were in fact posted at all stations between St. Louis and Atlanta, section 13a(1) is not invoked because the trains to be discontinued are not set forth in the notice. It renews its request on brief filed jointly with other protestants. Protestants further contend that at no place on either of the L&N notices do trains Nos. 3-5 nor 4-10 appear and that neither notice, by itself, lists all of the stations which would be affected by the discontinuance of trains Nos. 3-5 and 4-10. Protestants renew the challenge of service of notice upon the States on the ground that the affidavit of service states only that an individual "caused" service by mail and that the use of the word "caused" was criticized by the Commission in a recent decision and the carrier warned that in the future strict compliance with the provisions for proper service would be required. The record, however, shows that L&N has properly invoked the Commission's jurisdiction under section 13a(1) of the act in that service was properly effected and that both notices were properly posted at all stations served by the subject trains. Each notice lists the stations served by the set of trains to which it principally applied and sets forth in clear and unambiguous language the fact that one set of trains connects with the other, and, further, that the subject trains are in fact four trains as published in the carrier's schedules two of which connect at Evansville with the other two to permit the performance of a through service between St. Louis and Atlanta. The petition is denied.

Protestants contend that, since discontinuance of the trains, which are the last L&N passenger trains into and out of St. Louis, would involve an abandonment of operations over certain facilities used solely for passenger trains, discontinuance of the trains may not be allowed absent approval under sections 1(18)-1(22) of the act. While L&N could well have submitted such an application concurrently with its notices filed herein, its determination not to do so at this time does not prejudice our action herein.

Protestants also argue on brief that a rehearing is required on the grounds of prejudicial error because the presiding hearing examiner (1) erred in not informing the parties at the Evansville hearing of their right to file a brief on a date 3 weeks from the final hearing date, (2) erred in refusing to permit cross-examination of certain L&N witnesses at Nashville and Atlanta hearings on

the ground a prior request had not been made, (3) erred in receiving in evidence three L&N "rebuttal" exhibits not responsive to any opposition testimony, and that permitting such "rebuttal" testimony at Chattanooga deprived labor of the right to cross-examine effectively an important part of L&N's case, and (4) erred in sustaining objections at the Chattanooga hearing tending to show that L&N had a preconceived plan to withhold direct testimony concerning the role of passenger train service to industrial development until such community witnesses had been heard. The record shows that the presiding hearing examiner, shortly after the opening of the hearing at St. Louis, advised all parties present that briefs may be filed about 3 weeks after the final date of hearings and that the date for filing of briefs would be fixed on the final day of hearing. The date for filing of briefs 3 weeks hence was announced on the last day of hearing at Atlanta. No party was prejudiced by such action. The record shows that the rebuttal evidence offered while in some respects may be interpreted as exceeding the limitations of proper rebuttal is not such as would warrant our reversal of the ruling of the examiner and preclude its consideration by us in the determination of the issues involved. Our order specifying the procedure to be followed in the presentation of evidence did provide the presiding hearing examiner with considerable latitude in the conduct of the hearing. The ruling with respect to the request to cross-examine certain witnesses at Nashville and Atlanta on the ground that a prior request had not been made was proper, within the purview of our order, and was not prejudicial to the parties.

Background.– The L&N system operates as a north and south railroad, south from Cincinnati, Ohio, to Atlanta; south from Cincinnati to Louisville, Ky., Nashville, Tenn., New Orleans, La., Pensacola and Chattahoochee, Fla., and intermediate points; south from Chicago, Ill., to Evansville, Nashville and Atlanta, and intermediate points; and north from Atlanta to Chattanooga, Nashville and Memphis, Evansville and St. Louis, serving intermediate points.

Trains Nos. 3 and 4 were formerly numbered Nos. 93 and 54 (between Evansville and Atlanta) and trains Nos. 5 and 10 were formerly numbered Nos. 53 and 92 (between St. Louis and Nashville). In October 1967, the current numbers were adopted as a part of systemwide numbering of L&N trains. No change in service resulted from that change of numbers. Trains Nos. 5 and 10 are shown separately from trains Nos. 3 and 4 because of a prior requirement in *Louisville & N. R. Co. Discontinuance of Trains,*

331 I.C.C. 203, that L&N continue the operation of trains Nos. 53 and 92 between St. Louis and Evansville for a period of 1 year from November 22, 1967.

L&N, in conjunction with Chicago & Eastern Illinois Railroad Company (C&EI), formerly maintained coordinated "Georgian-Hummingbird" passenger train service connecting Chicago, Cincinnati, and St. Louis with a number of southeastern United States points. One segment of the "Georgian" operated between Chicago and Evansville (trains Nos. 93 and 54) over the C&EI with C&EI engines and traincrews and at the latter point L&N engines and crews were substituted. The "Georgian" continued as an L&N train between Evansville and Nashville, where some cars were transferred to the "Hummingbird" train, the latter train originating at Cincinnati and scheduled to arrive Nashville concurrently with the "Georgian." At Nashville cars destined to Atlanta were switched from the "Hummingbird" to the "Georgian" and cars destined to Montgomery and Mobile, Ala., were switched from the "Georgian" to the "Hummingbird." The St. Louis segment of the "Georgian" operated (trains Nos. 92 and 53) over L&N between St. Louis and Nashville, via Evansville, where its equipment was added to the "Georgian" and where passengers could also transfer to the "Hummingbird." After such switching at Nashville, the "Georgian" went on to Atlanta, and the "Hummingbird" went south to Birmingham, Montgomery and Mobile, Ala., and New Orleans, La. Those trains provided complete sleeping and dining facilities.

In *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed *per curiam* 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route. L&N and C&EI were directed to complete negotiations for the line within 1 year from February 7, 1967.

On June 28, 1967, L&N filed a notice under section 13a(1) of the act to discontinue the St. Louis segment of the "Georgian" trains between St. Louis and Nashville and in *Louisville & N.R. Co. Discontinuance of Trains, supra*, the trains (Nos. 92 and 53) were ordered continued between St. Louis and Evansville and permitted to be discontinued between Evansville and Nashville. On August 31, 1967, however, C&EI filed a notice under section 13a(1) proposing

to discontinue the Chicago-Evansville segment of the "Georgian" trains (C&EI-L&N trains Nos. 93 and 54); and in *Chicago & E.I.R. Co. Discontinuance of Trains*, 331 I.C.C. 447, served January 31, 1968, the trains were permitted to be discontinued. As a result of those proceedings the "Georgian" trains originated at Evansville instead of Chicago with the connecting segment between St. Louis and Evansville. A few days later, on February 3, 1968, L&N removed all sleeping and dining facilities from the Evansville-Atlanta segment of the "Georgian" trains. Subsequent to discontinuance by C&EI of the Chicago-Evansville segment of the "Georgian" trains, L&N sought reopening and reconsideration of the proceeding involving the St. Louis segment of the "Georgian" trains in *Louisville & N. R. Co. Discontinuance of Trains, supra*, but the further hearings scheduled were canceled at L&N's request. L&N also filed a notice under section 13a(1) of the act to discontinue the connecting "Hummingbird" trains (Nos. 6 and 7) over the route between Cincinnati and New Orleans predicating loss of passenger business on its trains from discontinuance of the trains by C&EI. On May 15, 1968, a petition by protestants for reconsideration of action taken in *Chicago & E.I.R. Co. Discontinuance of Trains, supra*, was denied. Court review of our action therein was instituted by the city of Chicago and others, protestants, on May 27, 1968. On September 6, 1968, in *Louisville & N.R. Co. Discontinuance of Trains*, 333 I.C.C. 720, discontinuance of the "Hummingbird" trains was permitted. That action was temporarily restrained and on January 8, 1969, in *City of Chicago* v. *United States*, 294 F. Supp. 1103 and *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106, both actions were dismissed. That action was appealed and on June 16, 1969, probable jurisdiction was noted by the United States Supreme Court, 395 U.S. 957, where the matter is still pending. It is significant, in the light of the background, to note that this proceeding was instituted on July 9, 1969.

Basis for the proposal.—L&N bases its proposal to discontinue the operation of the subject trains principally on alleged savable losses of $811,388 in 1967, $672,359 in 1968, and $519,055 for the first 7 months of 1969. Based on the representations (1) that the Post Office Department will, effective November 29, 1969, remove storage mail now moving on the subject trains to highway service, L&N projects its losses for year 1969 would approximate $883,615, and an annual loss of $942,364 after the Post Office Department takes the mail off the trains, (2) that passenger revenues

and passenger utilization of the service has been low and is decreasing at a substantial rate, and (3) that there is alternate service available. L&N submits the subject trains are no longer required and that continued operation imposes an undue burden on interstate commerce.

Description of train operation.—These trains are the last passenger trains between Atlanta and Evansville and between Evansville and St. Louis. For all practical purposes they operate as a single pair of trains between Atlanta and St. Louis, via Evansville, but are published in two separate schedules. Trains Nos. 3 and 4 are operated daily between Evansville and Atlanta and trains Nos. 5 and 10 are operated daily between St. Louis and Evansville upon schedules shown in appendix A, which reflects all intermediate points served together with their respective populations. Train No. 4 operates daily departing Atlanta at 5:15 p.m. (e.s.t.) arriving Evansville at 3:40 a.m. (c.s.t.). Train No. 4 connects with train No. 10 which departs daily from Evansville at 4:15 a.m. (c.s.t.) and arrives at St. Louis at 8:55 a.m. (c.s.t.). Train No. 5 departs daily from St. Louis at 4 p.m. (c.s.t.) and arrives at Evansville at 8:30 p.m. (c.s.t.). Train No. 5 connects at Evansville with train No. 3, which departs Evansville at 9:40 p.m. (c.s.t.) and arrives Atlanta at 10:55 a.m. (e.s.t.).

The normal consist of trains Nos. 4-10 is one diesel locomotive, one Atlanta-Nashville storage mail car, one Nashville-St. Louis storage mail car, one Atlanta-St. Louis baggage and mail car, and one Atlanta-St. Louis reclining seat coach. During June, July, and August an additional coach is added on weekends. One deadhead Atlanta-Nashville storage mail car is also carried on each of 5 days of the week. No sleeping or dining cars are now carried on the trains. The normal consist of trains Nos. 3-5 is one single-unit diesel locomotive, one St. Louis-Atlanta storage mail car, one St. Louis-Atlanta baggage and mail car, and one St. Louis-Atlanta coach with an additional coach on weekends during June, July, and August. On 5 days a week two additional Nashville-Atlanta storage mail cars are carried on train No. 3. One deadhead storage mail car is also carried between St. Louis and Nashville. No sleeping or dining cars are carried on the trains nor is any food service available for the convenience of passengers on any of the trains during the 609-mile trip between St. Louis and Atlanta, such services having been discontinued in 1966 on the St. Louis-Evansville trains when the trains were designated trains Nos. 53 and 92, and in February 1968, on the Evansville-

Atlanta trains. That circumstance is frequently referred to by protestants as contributing to declining patronage, but defended by the railroad as an economy measure. While there is no food service available or provided on the trains, the carrier represents that southbound passengers on train No. 5 have a 70-minute layover at Evansville before proceeding on train No. 3 to Atlanta, and have available a restaurant across the street from the L&N railroad station, and passengers on train No. 3 are given time (10 minutes) at Chattanooga to obtain breakfast. Northbound passengers on train No. 4 arrive Chattanooga at 8:30 p.m. and depart at 8:45 p.m., and may obtain evening meal service at that point. No other convenient point is provided on train No. 10 which departs Evansville at 4:15 a.m. arriving St. Louis at 8:55 p.m.

Each train handles passengers, some U. S. mail, and baggage. No express, except for a single movement on train No. 3 from Nashville to Atlanta, has been handled on trains Nos. 3 or 4 since April 1, 1968. No express has been handled on trains Nos. 5 or 10 since April 1, 1968. Some express previously handled on these trains now moves trailer-on-flatcar (TOFC).

Storage mail now moves in these trains. However, the Post Office Department has notified L&N that the last day for handling bulk mail at L&N's Nashville station will be November 28, 1969, and that effective November 29, 1969, substantial changes with respect to transportation of storage mail will be instituted. In that regard, effective April 18, 1969, the Nashville to Kansas City, Mo., storage mail was diverted to TOFC service by order of the Post Office Department. All other storage mail now moving in these trains will be diverted to star routes by highway carriers. Thereafter, only a small amount of preferential mail would be expected to be handled on these trains.

The passenger coaches utilized by these trains are described by the carrier as modern and well maintained, of steel and aluminum construction, purchased new in 1946, and have seating capacity of 60 persons in each coach. The coaches are equipped with reversible reclining seats, are air conditioned, have modern lighting, washroom and toilet facilities. All cars are equipped with trucks designed to provide easy, comfortable riding. The equipment is serviced and receives interior cleaning prior to departure from Atlanta and St. Louis and exterior cleaning at Atlanta. The single unit E-class diesel passenger locomotive equipment now used in the operation of these trains is more than 20 years old. That equipment together with passenger equipment

and L&N owned head-end cars used on the trains would be retired on discontinuance of their operation, if authorized. Foreign line head-end cars would be returned to the owners.

Financial data.—The carrier's balance sheet statement as of June 30, 1969, shows assets of $1,049.3 million, including current assets $95 million, special funds $4.7 million, investments $39.2 million, total properties less reserve for depreciation and amortization $900.4 million, and other assets and deferred charges $9.8 million. Liabilities were: Current liabilities $60.5 million, long-term debt due within 1 year $29 million, long-term debt due after 1 year $423.9 million, reserves $5.7 million, other liabilities and deferred credits $19.2 million, capital stock $123.9 million, capital surplus $22.1 million and retained income unappropriated $364.6 million. L&N income statements for 1967, 1968, and first 6 months of 1969 show, respectively, railway operating revenues of $285.3 million, $301.7 million, and $161.7 million; net railway operating income of $31.4 million, $35.0 million and $19.3 million; and ordinary net income after fixed charges and other deductions of $19.9 million, $22.9 million, and $13.1 million.

Financial results.—L&N submitted financial results of the trains' operation for 1967, 1968, and first 7 months of 1969. Revenues during 1967 and 1968 include passenger, mail, express, baggage, dining and passenger car rental. During the 1969 partial-year period revenues include passenger, mail, express and baggage only. Passenger counts are for the 19 months' period ended July 31, 1969. Excluding maintenance-of-way and structures expense, L&N data show in 1967 trains Nos. 3 and 5 revenues of $1,064,861, and out-of-pocket expenses of $1,519,674, for an out-of-pocket loss of $453,813. During the same period for trains Nos. 4 and 10 revenues were $1,134,769 and out-of-pocket expenses $1,439,380, for an out-of-pocket loss of $304,611. In 1968, the L&N data show trains Nos. 3 and 5 as having revenues of $477,264, and out-of-pocket expenses of $822,718, for an out-of-pocket loss of $345,454. During the same period trains Nos. 4 and 10 revenues were $570,751, and out-of-pocket expenses $815,338, for an out-of-pocket loss of $244,587. During the first 7 months of 1969, the data show trains Nos. 3 and 5 as having revenues of $227,723, and out-of-pocket expenses of $457,844, for an out-of-pocket loss of $230,121. During the same period trains Nos. 4 and 10 revenues were $194,013, and out-of-pocket expenses of $426,243, for an out-of-pocket loss of $232,230. Operation of the

combined trains for the periods indicated shows, respectively, revenues of $2,199,630, $1,048,015, and $421,736, out-of-pocket expenses of $2,958,054, $1,638,056, and $884,087. The net out-of-pocket losses, after excluding maintenace of way and structures and giving effect to feeder value, but before Federal income tax effect, are, respectively, $566,397, $564,618, and $461,282. Operations for 1969 (projecting data from the first 7 months) are expected to produce net out-of-pocket (savable) losses, before Federal income tax effect, of $784,130, and projecting such data for the period December 1, 1969 through November 30, 1970, would approximate net pre-tax out-of-pocket (savable) loss of $942,364. The latter figure is submitted to show effect of loss of mail on November 29, 1969. L&N argues that discontinuance of the trains in 1967 or 1968 would have been warranted considering the losses it shows in those periods, and that continued operation in the light of the projected 1969 loss of $784,000 reflecting feeder gain based on current operations, and in the light of the annual loss of $942,364 reflecting loss of U. S. mail effective November 29, 1969, after deducting gain from that mail which would move in TOFC, and which may be expected as a minimum loss for future years, cannot be justified. L&N further argues that such losses cannot be justly absorbed by it because such losses are an uneconomic drain on its working capital.

L&N's financial results of the operation of both sets of trains for the first 7 months of 1969 and as projected for all of 1969 based on present operation are shown in appendix B. L&N expects benefits from a net annual savings through discontinuance excluding maintenance of way and structures, but including feeder traffic gain, of $784,130 before provision for taxes (26.4 percent rate) and $577,119, after such provision. Projected for a 12-month period December 1, 1969 through November 30, 1970, L&N expects to realize a net annual savings through discontinuance, excluding expense for maintenance of way and structures, and including gain from U. S. mail diversion, of $942,364 before provision for taxes (estimated at 24.6-percent rate) and $710,544 after such provision. Passenger revenues were determined by applying system average revenue per passenger-mile to the actual number of revenue passenger-miles developed on these trains and reflect the 10-percent increase effective July 1, 1968.

Passenger-miles attributable to the subject trains were obtained from an analysis of ticket collections and daily reports submitted by conductors on these runs. Mail revenues were based on actual

billings. Express revenues (carload) are actual; less than carload are based on calculations using car foot-miles applicable to the trains as against the system totals. Baggage revenues are actual. Wages of train and enginecrews are actual amounts paid, to which has been added allowance for appropriate payroll taxes, vacation, holiday, health and welfare, paid by L&N for account of the crews. Locomotive repairs, fuel, lubricants, other locomotive supplies, and enginehouse expenses are based on a system average cost (excluding overhead) per diesel unit-mile applied to the diesel unit-miles operated by the subject trains. Locomotive and car depreciation costs and costs of deadheading cars, and the wages and fringe benefits of station employees at Nashville are excluded from out-of-pocket expenses of the subject trains. Such losses are thus claimed to be understated for the 1969 projection by $80,199.

Passenger car repairs and train supplies and expenses were computed by applying system average cost (excluding overhead) per passenger car-mile to the car-miles operated by the subject trains Nos. 3, 5, 4, and 10. Rent for passenger train cars was computed by multiplying appropriate mileage rate by the mileage accrued on the L&N (in the subject trains) for foreign line passenger cars operating between Atlanta and St. Louis. Personal injury and property damage expenses were computed on basis of average annual cost per passenger train-mile using expenses charged to passenger service and passenger train-miles for the system.

Terminal expenses covered expenses at St. Louis, Evansville, and Atlanta, as well as cost of operation of joint-line facilities. These were calculated on an avoidable cost basis approved by this Commission in *Chicago, R. I. & P. R. Co. Discontinuance of Trains*, 328 I.C.C. 278. Discontinuance of trains Nos. 5 and 10 would eliminate all these expenses since they are the last L&N passenger trains to utilize the terminals. Those expenses included are costs of operating the trains through various zones of the terminal plus bridge transfer charges and trackage charge for use of main-line tracks and East St. Louis, Ill., relay passenger station. Expenses at Evansville include cost of operating the subject trains through the joint terminal, apportioned to L&N and C&EI on number of cars into and out of terminal. However, effective February 3, 1968, that terminal ceased to be a joint operation and no expenses are shown after that date for the subject trains. Expenses at Atlanta include cost of operating the

subject trains into and out of joint terminal, apportioned to L&N, Seaboard Coast Line, and Georgia Railroads on number of cars into and out of terminal. However, effective January 26, 1969, terminal ceased to be jointly operated and no expenses are shown after that date for operating subject trains into and out of terminal. Station employees expense and station supplies expense as shown are actual. Discontinuance of the trains would eliminate the positions of the former and there would be no need for the latter.

Passenger revenues projected for 1969 were determined by using the passenger revenues earned during the first 7 months of 1969, and adjusting to 12 months assuming heavier travel during vacation months and special holidays. No adjustment was made to reflect the downward trend in rail passenger utilization. The mail revenues projection was estimated on basis of notice received from the Post Office Department that all storage mail would be discontinued on the subject trains effective November 29, 1969, and upon advice of post office officials that limited preferential mail would continue on the subject trains. Projected expenses were applied as previously described for current operations using consist of one locomotive, one coach and one head-end car on each of the subject trains, and assumed no additional equipment during heavy travel periods. Feeder revenue and expenses were predicated on analysis from samples of passenger and mail traffic feeding to and from the subject trains. While protestants express some dissatisfaction with a number of areas of L&N's financial data their arguments are not persuasive.

Use of the train service.—L&N's evidence shows that there has been a decrease in passenger-miles for trains Nos. 4-10 and 5-3 between Atlanta and St. Louis in recent years. Passenger-miles for trains Nos. 4-10 for 1967, 1968 and first 7 months of 1969 were 16,779,931, 6,000,831, and 1,288,508, respectively. Passenger-miles for trains Nos. 5-3 were 17,017,116, 4,082,958, and 918,233 for the same periods, respectively. For the separate segments trains Nos. 3 and 4 between Atlanta and Evansville passenger-miles for 1966, 1967, and 1968 were 36,167,888, 30,271,327, and 7,661,396, respectively. As to trains Nos. 5 and 10 passenger-miles for the same periods were 4,998,844, 3,525,-720, and 2,422,393, respectively.

L&N's passenger count data covers a period of 18 months beginning February 1, 1968 and ending July 31, 1969, during which the subject trains carried 33,829 passengers (18,480 on trains Nos. 4-10 and 15,349 on trains Nos. 5-3). During that period, 8,211

passengers boarded train No. 4 at Atlanta, of which 1,918 came from other connections, 3,552 at Nashville, of which 1,835 came from other connections, 1,975 at Chattanooga, of which 208 came from other connections, 330 at Hopkinsville, 322 at Marietta, Ga., 264 at Tullahoma, Tenn., 152 at Dalton, 108 at Madisonville, Ky., 79 at Cartersville, Ga., 70 at Henderson, Ky., and 4 at Guthrie, Ky. The same train on departing Evansville as No. 10, received on board 1,566 passengers, 683 at Carmi, 418 at McLeansboro, 297 at Mount Vernon, Ill., 271 at Mount Vernon, Ind., 122 at Nashville, Ill., 28 at Enfield, Ill., 27 at Belleville, Ill., and 1 at St. Louis. Of those passengers detraining from train No. 4, 4,017 detrained at Nashville, Tenn., of which 2,573 went to other connections, 768 at Evansville, 774 at Chattanooga, of which 14 went to connecting trains, 263 at Tullahoma, 223 at Hopkinsville, 100 at Madisonville, 74 at Henderson, 12 at Dalton, 9 at Marietta, and 5 at Guthrie. On the same train departing Evansville as No. 10, 11,065 detrained at St. Louis, of which 4,972 went to connecting trains, 368 at Belleville, 360 at Mount Vernon, Ill., 157 at East St. Louis, 80 at Carmi, 70 at Nashville, Ill., 53 at McLeansboro, 39 at Mount Vernon, Ind., 30 at Enfield and 13 at Ashley, Ill. Trains Nos. 4-10 carried a daily average of 84.4 passengers during that period.

During the same 18-month period, 6,948 passengers boarded train No. 5 at St. Louis, of which 728 came from connecting trains, 713 at Mount Vernon, Ill., 553 at Belleville, 247 at Nashville, Ill., 189 at East St. Louis, 166 at Carmi, 128 at McLeansboro, 121 at Mount Vernon, Ind., 118 at Enfield, 37 at Dahlgren, Ill., and 12 at Ashley. The same train departing Evansville as train No. 3, received 934 passengers, of which 101 came from other connecting trains, 3,644 at Nashville, Tenn., of which 2,718 came from other connections, 400 at Chattanooga, of which 3 came from other connections, 554 at Marietta, 266 at Hopkinsville, 129 at Tullahoma, 99 at Henderson, 97 at Madisonville, 2 at Dalton, and 1 at Cartersville. Of those passengers detraining from train No. 5, 1,502 detrained at Evansville, 930 at Carmi, 731 at Mount Vernon, Ill., 702 at McLeansboro, 379 at Mount Vernon, Ind., 266 at Nashville, Ill., 112 at Dahlgren, 109 at Enfield, 82 at Ashley, 49 at Belleville, 11 at East St. Louis, and 1 at Maunie, Ill. On the same train departing Evansville as No. 3, 5,704 detrained at Atlanta, of which 1,177 went to connecting trains, 2,263 at Nashville, Tenn., of which 1,423 went to other connections, 1,424 at Chattanooga, of which 190 went to connecting trains,

242 at Marietta, 197 at Madisonville, 174 at Hopkinsville, 148 at Tullahoma, 83 at Dalton, 74 at Henderson, and 66 at Cartersville. Trains Nos. 5-3 carried a daily average of 28.6 passengers during that period.

Alternate passenger transportation services.— Between Chattanooga and Atlanta the Southern Railway operates a pair of trains Nos. 3 and 4, over a route which serves only the intermediate point of Dalton, Ga. Except for the subject trains and the aforementioned trains of Southern, no other rail service is available between the points involved. Numerous bus schedules daily each way are operated between Atlanta and St. Louis, and serve 19 of the 24 stations which are served by the subject trains. Seven schedules (3 westbound and 4 eastbound) operate daily serving Atlanta, St. Louis, and all but 5 of the above 24 stations. Forty-four (22 between Atlanta and Chattanooga) operate daily between Atlanta, Marietta, Cartersville, Dalton, Chattanooga, Tullahoma, Nashville, Tenn., Guthrie, Hopkinsville, Madisonville, Henderson, Evansville, Carmi, Mount Vernon, Ashley, Nashville, Ill., Belleville, and East St. Louis.

By air, service is available at Atlanta, Chattanooga, Nashville, Evansville and St. Louis, with frequent flights between those points daily. In recent years there has been a substantial increase in airline service available and utilized to and from the points named.

In summary, aside from the subject rail service, St. Louis is served daily by 42 air schedules and 10 bus schedules, East St. Louis, Belleville, Henderson, and Madisonville by 10 bus schedules, Nashville, Ashley, and Mount Vernon, Ill., by 8 bus schedules, Carmi by 4 bus schedules, Evansville by 14 bus schedules and 8 air schedules, Hopkinsville by 11 bus schedules, Guthrie by 4 bus schedules, Nashville, Tenn., by 20 bus schedules and 35 air schedules, Tullahoma by 6 bus schedules, Chattanooga by 40 bus schedules and 24 air schedules, Dalton by 19 bus schedules, Cartersville by 27 bus schedules, Marietta by 25 bus schedules, and Atlanta by 41 bus schedules and 63 air schedules. As indicated, Dahlgren, McLeansboro, Enfield, Maunie, Ill., and Mount Vernon, Ind., have no alternate public transportation service available.

Generally paralleling the route between the principal termini is a network of public highways and some segments of high-speed interstate and toll roads for users of private automobiles and the record reflects a growth in the number of automobiles using

the public highways in the States involved. Those roads are all-weather roads and for the most part are U. S. highways. Maunie is served by a county road and Mount Vernon, Ind., by a State road. The record indicates, however, that some of the highways are still under construction or in a bad state of repair.

Effect upon employees.—Discontinuance of the subject trains would affect 43 positions, including 32 train and enginecrew positions. There are two regular crews assigned to the operation of the trains Nos. 3-5 and 4-10 in each of the four seniority districts. Of the 32 train and engine service positions there are (1) six engineman and six fireman positions, six conductor positions and six trainman positions which comprise three four-man crews for train No. 3 and three four-man crews for train No. 4 over the 444-mile segment between Atlanta and Evansville each train travels, and (2) two engineman positions, two fireman positions, two conductor positions, and two trainman positions which comprise one four-man crew for train No. 5 and one four-man crew for train No. 10, over the 165-mile segment between Evansville and St. Louis. Of the 11 station employee positions, 9 are located at Atlanta and 1 each at Chattanooga and Evansville. The railroad has no passenger service employees at St. Louis, and the station organization there acts as its representative.

Included in the above, eight firemen are protected employees, four whose employment would be eliminated shortly by retirement; the balance within a year by attrition. Those employees operating the subject trains have been in service many years and can, by exercising seniority right, displace younger men. The latter would be placed on the extra-board. The carrier points out that there is a constant movement from the extra-board to regular assignments due to average turnover each year brought about by retirement under the Federal Railroad Retirement Act, deaths, and other causes.

Certain rail labor groups assert that employees will be adversely affected by discontinuance and some urge that we impose protective conditions such as those in *Chicago, B. & Q. R. Co.—Abandonment*, 257 I.C.C. 700. Having no authority to impose such conditions, we limit our consideration of the effect upon employees to its relation to the public convenience and necessity and the burden on interstate commerce issues. Should these trains be allowed to discontinue operation the temporary slight adverse effect such discontinuance may have on individual employees does

not warrant extended discussion as it appears that such dislocation except for station employees would be for a relatively short time.

Alternatives to complete discontinuance.—Our order instituting investigation herein required the parties to be prepared to present evidence on, among other things, the feasibility of requiring the continuance in part of the trains' service, including, but not limited to, service over a segment of the route, weekend, seasonal, holiday or special run service, mixed passenger-freight service, or a combination of the foregoing or other limited service. The carrier contends that these alternatives were neither feasible nor practical in that they would serve only to produce ineffective costly segmented operations.

Evidence in opposition.— Fifty-one individuals testified in opposition to the discontinuance, including a State senator (Indiana), the mayors of Evansville, Carmi, and McLeansboro, and a number of city officials of Mount Vernon, Ill. As representatives of the communities they serve, they express deep concern over the proposed discontinuance of rail passenger service to their communities as they consider the service vital and necessary. Other public witnesses include representatives of the Public Service Commissions of Indiana and Tennessee, two members of NARP, and numerous business and professional persons, small shop owners and operators, farmers, housewives, retired persons, railroad employees, and members of rail labor organizations. Additionally, it was stipulated that seven individuals at Evansville and five at Carmi, if called, would testify similarly to other witnesses at those points. The tenor of the evidence presented by those opposing discontinuance covers a broad spectrum. Most of those expressing opposition were concerned by continued operation of the trains between St. Louis and Evansville, although a number were concerned with connections for points beyond. Others were concerned with transportation to and from Atlanta and Chattanooga. Their use of the trains was generally for visits to the larger cities for purposes of shopping, visiting relatives in hospitals, and meeting doctors' appointments; some were concerned with use of the trains for business purposes primarily because of the convenience the trains provided and others for baggage accommodation; some were elderly and found rail transportation more suited to their needs; and some preferred rail over other modes, generally. A number of complaints were expressed as to the quality of the service and the cleanliness of the cars and facilities on the cars. Many complained about the lack of food and sleeping

car service and failure of air conditioning or heating equipment which, if corrected, could have improved the situation. Complaints were also expressed respecting poor on-time performance, the long layover at Evansville, and the priority of movement given freight trains over the subject trains. A number also expressed concern over poor lighting on occasions and lack of clean washrooms. Complaint was also made that while several years ago the train speed was generally 70 miles per hour maximum it had been reduced to a 60-mile per hour maximum and more recently reduced to a 50-mile per hour maximum, and that the ride was particularly rough indicating the roadbed could be improved. The carrier offered evidence, however, to show some effort was being made to improve the condition of the roadbed. While their use of the trains ranged from once a week to several times annually (although some had not used the service for a number of years), the consensus generally was that the quality of the service was vastly in need of improvement.

L&N, on brief, contends that the subject trains are being operated at heavy financial loss, and that substantial savings would be realized by their discontinuance. It also takes the position that discontinuance of the trains in 1967 or 1968 would have been warranted considering the heavy losses in those years, and that their continued operation in 1969, in the light of current operations as projected and in the light of the projection subsequent to November 29, 1969, reflecting loss of mail, constitutes an onerous burden. It further contends that if required to continue operation of the trains it will incur $8 in savable expenses for each $1 of revenue collected and that more than 100,000 passengers annually (or 300 daily) would be required to liquidate such a loss and approach the breakeven point on the basis of such projected operations after November 29, 1969, or an increase of 828 percent. It maintains the evidence shows that passenger traffic will continue to decline despite the steady increase in the population at the stations served by the trains, that those traveling locally use the bus or private passenger cars, while those traveling between the major cities are increasing their use of commercial airlines, and that remaining transportation services will be entirely adequate.

Protestants, in their joint brief, argue that the trains are required by the public convenience and necessity. While acknowledging that the record here reveals a sharp decline in the patronage of the trains since February 1, 1968, they contend that the decline was brought about by four principal developments. First, they

argue, the C&EI discontinuance (Chicago-Evansville) on February 1, 1968, caused a severe reduction in passenger traffic since passengers can no longer travel by rail between Chicago and Evansville, pointing out that trains Nos. 3 and 4 generated 13.7 million and 14.8 million passenger-miles, respectively, in 1967, and that those trains generated only 3.2 million and 4.5 million miles, respectively, in 1968, and that such comparison understates the effect of the C&EI discontinuance since the C&EI segment operated for the month of January 1968. Second, they argue, was the discontinuance of the "Hummingbird" trains on January 9, 1969, which resulted in reduction in patronage, because approximately 30 percent of the users of train No. 4-10 and 36 percent of the users of train No. 3-5 transferred to or from the "Hummingbird" at Nashville during the period March-December, 1968. Third, they argue, was the removal of dining and sleeping car facilities on trains Nos. 3 and 4 between Evansville and Atlanta after discontinuance of the C&EI segment. Fourth, they argue, is the activity of L&N to discourage use of the trains, pointing to the reduction in passenger train speed from 70 miles per hour maximum to the present 50 miles per hour maximum and the long delay (1 hour, 10 minutes) at Evansville. Because of such factors, protestants contend the decline in patronage does not reflect a comparative decline in the public need for the trains between St. Louis-Evansville-Atlanta.

The protestants also argue that discontinuance of the subject trains should not be permitted prior to a ruling by the Supreme Court on the pending "Georgian" and "Hummingbird" appeals in *City of Chicago* v. *United States, supra,* and *Tennessee Public Service Commission* v. *United States, supra,* since, if the appellants prevail, discontinuance would make restoration of the "Georgian-Hummingbird" service impossible because the connecting link or middle segment will have been eliminated.

Discussion and Conclusions

Here, as in most proceedings under section 13a(1) of the act, we are faced with a proposal to discontinue a rail passenger service (here the last sets of trains between the termini) that has been conducted at a loss. The removal of Railway Post Office cars by the Post Office Department in recent years and subsequent action by it in instigating or permitting the shift of storage mail to TOFC

on freight trains as well as the present proposal to shift the transportation of mail to star routes by highway carriers has not improved the situation.

Among the factors generally considered in proceedings under section 13a(1) of the act to ascertain whether operation or service of passenger trains is required by the public convenience and necessity and will not unduly burden interstate commerce, are the population served, the effect upon the communities, the extent of the use by the public of the service sought to be discontinued, other available or alternate transportation service in the area, the cost incurred and financial loss sustained by the carrier in providing the service under consideration, and the carrier's financial condition. Also warranting our consideration in determining the public convenience and necessity is whether or not we, in administering section 13a(1) of the act, are preserving a national transportation system by rail for passengers, insofar as is needed, to meet the changing needs of commerce, among others. We must evaluate the public convenience and necessity requiring the continuance of the service, on the one hand, with, on the other, the degree of burden imposed on interstate commerce due to the carrier's financial loss resulting from continuance of the trains. No factor alone is conclusive or controlling. The weight afforded each is determined by the circumstances presented in each case.

Concerning the public convenience and necessity, L&N here has endeavored to show that in measuring the public need for the trains there has been a decrease in passenger traffic in recent years and that the decreased patronage has been marked. The evidence of record also clearly shows, however, that decrease in patronage was undoubtedly due in no small measure to a marked deterioration in the service provided by these trains, a matter wholly within the province and control of the railroad. Most of the complaints voiced regarding service deficiencies are, in our opinion, justified on the basis of the record. No dining cars or other food service facilities are provided on the trains for any segment of the 609-mile run, not even food or beverage vending machines. As previously noted, dining car service was discontinued on the Atlanta-Evansville segment in February 1968, a few days after discontinuance of the C&EI Chicago-Evansville segment of the "Georgian." To obtain any sustenance, other than carrying their own food aboard, passengers must leave the train during the 70-minute layover at Evansville and cross the street to an all-night restaurant to obtain refreshments. While train No. 5-3 on the south-

bound trip from St. Louis to Atlanta arrives and departs Evansville at 8:30 p.m. and 9:40 p.m., respectively, train No. 4-10 on the northbound trip arrives at Evansville at the early morning hour of 3:40 a.m., departing at 4:15 a.m. The only other time food is obtainable is during a 10- or 15-minute stop (depending on the direction of travel) at Chattanooga. As to providing food and beverage vending machine service on these trains, the record shows that L&N had studied vending machines previously, but not for these particular trains. While several witnesses complained of the lack of sleeping car service, most of the complaints regarding the absence of sleeping car and eating facilities centered on the lack of food service.

With respect to complaints of poor on-time performance, the record shows that out of 28 trips during January 1969, train No. 5-3 southbound from St. Louis arrived late at Atlanta on 16 occasions and was on time on only 12. On seven of these trips the train was over 1 hour late, from 30 minutes to 1 hour late on three, from 15 to 30 minutes late on five, and less than 15 minutes late on one occasion. During the same period, out of a total of 27 trips, train No. 4-10 northbound from Atlanta arrived late in St. Louis on 22 occasions, and arrived on time on only 5. The train was over 1 hour late on 12 occasions, from 30 minutes to 1 hour late on 7, and from 15 to 30 minutes late on 3. During the months of June, July, and August 1969, out of a total of 92 trips, train No. 5-3 was late in arriving in Atlanta on 52 occasions and arrived on time on 40. It was over 1 hour late on 5 trips, from 30 minutes to 1 hour late on 10, from 15 to 30 minutes late on 17, and less than 15 minutes late on 20. During the same months train No. 4-10, out of a total of 91 trips, arrived late in St. Louis on 56 occasions and was on time on 35. On 10 trips it was over 1 hour late, from 30 minutes to 1 hour late on 14, from 15 to 30 minutes late on 21, and less than 15 minutes late on 11. While we recognize that trains are delayed at times for reasons beyond the carrier's control, we find little such explanation of record in this proceeding. The on-time performance of these trains leaves much to be desired and is not conducive to retention of or increase in patronage. In a similar vein, and as previously noted, numerous complaints were made with respect to the reduction of the maximum speed of these trains from 70 to 60, and more recently, to 50 miles per hour. Those complaints are, in our view, justified, but, as also previously noted, the record indicates that the carrier is taking steps to rectify this situation. We would expect L&N to continue its efforts

in this direction. We are also of the view that L&N should explore the possibility of reducing the lengthy layover time at Evansville. We do not agree that the carrier was precluded by any prior order of the Commission from taking such steps as may be necessary to effect such change, including an appropriate petition to the Commission. Other reasons for the decrease in patronage are the elimination of porters, slower schedules, dirty cars, and poorly equipped facilities, such as washrooms, et cetera, all of which are significant in the eyes of the users of the service. It may be added that had L&N continued to exercise diligence toward its passenger service after removing sleeping cars and food service facilities, as it had prior thereto, instead of removing services not only attractive to the rail passenger but vital to the latter's support of rail transportation service, it would have, in our opinion, enjoyed revenue from its passengers more in keeping with the amount of revenue received in the recent period of record and would have incurred considerably less loss in the operations of the trains in those recent periods of record here. With respect to promotional efforts on the carrier's part, the record shows that the last large advertising of its passenger service took place in about 1963. Also in this connection, however, we are aware of the need for the public to demonstrate, by its patronage of these trains, the extent to which it considers such service to be required by the public convenience and necessity.

As previously indicated, L&N anticipates loss effective November 29, 1969, of a substantial portion of mail traffic currently handled on the subject trains. L&N filed the notice proposing to discontinue these trains on July 9, 1969, almost 5 months before the mail traffic was expected to be diverted. The claimed burden on interstate commerce from continued operation of the subject trains is predicated on *pro forma* financial data "giving effect" to operations without mail revenues which have not yet been lost. While L&N has attempted in that *pro forma* presentation to show revenue cost data which it anticipates may be applicable to the operation of trains under new consists and operating arrangements the carrier chose not to afford any time to determine what the actual operating results might be and to assume that operating losses necessarily would flow from elimination from the trains' earnings of the revenues which theretofore had accrued from the mail traffic. In the absence of evidence showing L&N's actual experience in the operation of these last trains under the anticipated new arrangement the record does not provide a basis for reaching a conclusion as to the resulting operating situation.

The degree of burden on interstate commerce as a result of loss financially incurred by L&N in continuing to operate the subject trains depends for all practical purposes on how seriously such financial loss will affect its other passenger and freight operations. It is obvious on this record that L&N is incurring losses in operating the subject trains. However, we do not believe the losses sustained will place an undue burden on or seriously affect its other passenger and freight operations during the period we will require the continued operation of these trains.

In view of the fact that there remains a significant number of so-called "hard-core" passengers using the trains, the likelihood that patronage would increase with more attractive service, that future revenues and expenses do not reflect the experience of the carrier under circumstances it only anticipates would result, and considering the carrier's financial position, a continuation of the subject trains for a reasonable period to determine whether its revenue and expense expectations will be borne out, allowing it also time to extend some improvement to attract passenger traffic which it has long failed to do, is warranted. Following actual experience under the changed circumstances, a new judgment can be made as to financial results of the operations and how these relate to the public need for continuance in whole or in part.

Contentions of the parties as to fact or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

We find that operation by Louisville and Nashville Railroad Company of passenger service on its trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and trains Nos. 5 and 10 between Evansville and St. Louis, Mo., is required by the public convenience and necessity and will not unduly burden interstate commerce.

An appropriate order will be entered.

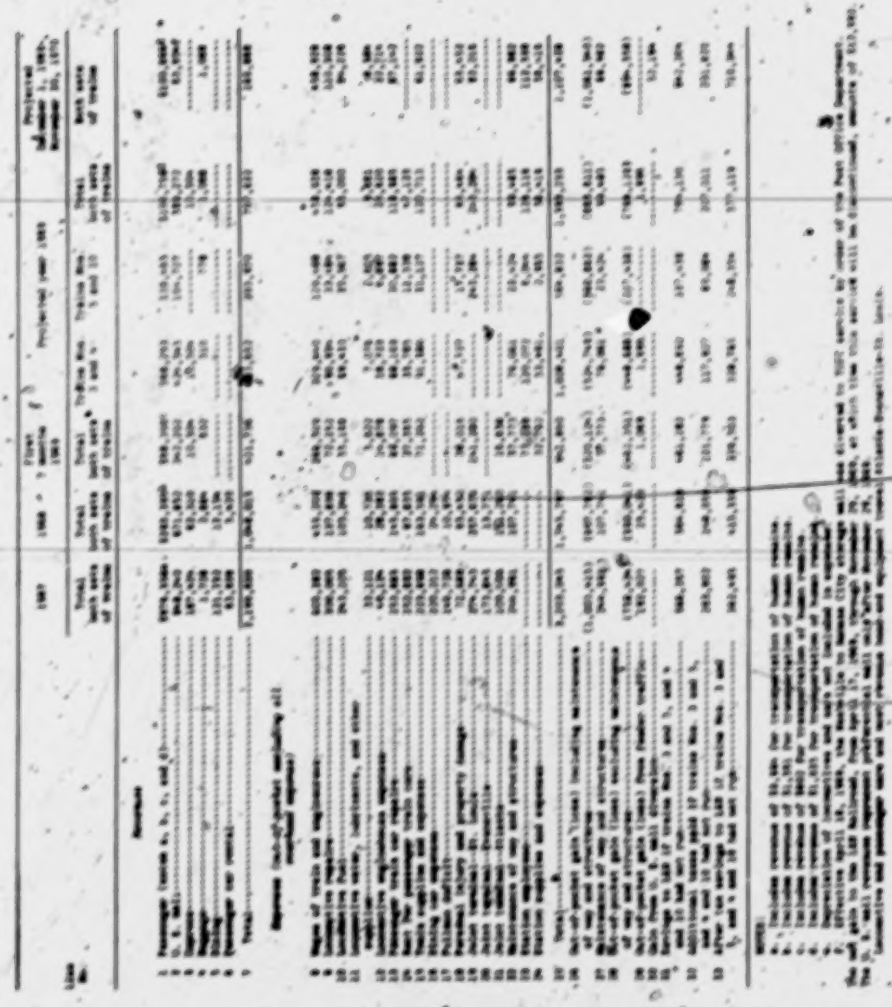
COMMISSIONER TUGGLE concurs in the result.

APPENDIX A

Trains Nos. 4-10 daily (read down)	Miles	Station	Population *1968	Trains Nos. 3-5 daily (read up)
Train No. 4				*Train No. 5*
5:15 p.m. (EST)	0	Lv. Atlanta, Ga	515,000	Ar. 10:55 a.m. (EST)
H 5:51 p.m.	20	Lv. Marietta, Ga	27,800	Lv. H 10:10 a.m.
R 6:25 p.m.	45	Lv. Cartersville, Ga	10,000	Lv. R 9:31 a.m.
H 7:23 p.m.	96	Lv. Dalton, Ga	18,700	Lv. H 8:30 a.m.
8:30 p.m.	134	Ar. Chattanooga, Tenn	122,000	Lv. 7:35 a.m.
8:45 p.m.		Lv. Chattanooga, Tenn		Ar. 7:25 a.m.
9:44 p.m. (CST)	216	Lv. Tullahoma, Tenn	15,507	Lv. 4:19 a.m. (CST)
11:20 p.m.	285	Ar. Nashville, Tenn	250,887	Lv. 2:55 a.m.
11:45 p.m.		Lv. Nashville, Tenn		Ar. 1:40 a.m.
Y 12:42 a.m.	333	Lv. Guthrie, Ky	1,211	
Y 1:16 a.m.	357	Lv. Hopkinsville, Ky	22,800	Lv. Y 11:33 p.m.
Y 2:13 a.m.	392	Lv. Madisonville, Ky	13,400	Lv. Y 10:44 p.m.
Y 3:02 a.m.	431	Lv. Henderson, Ky	21,000	Lv. X 10:02 p.m.
3:40 a.m. (CST)	444	Ar. Evansville, Ind	145,000	Lv. 9:40 p.m. (CST)
Train No. 10				*Train No. 3*
4:15 a.m. (CST)	444	Lv. Evansville, Ind		Ar. 8:30 p.m. (CST)
4:46 a.m.	463	Lv. Mt. Vernon, Ind	6,201	Lv. 7:40 p.m.
	475	Lv. Maunie, Ind	363	Lv. T 7:26 p.m.
5:16 a.m.	482	Lv. Carmi, Ill	6,152	Lv. 7:14 p.m.
f 5:27 a.m.	492	Lv. Enfield, Ill	791	Lv. B 6:59 p.m.
5:50 a.m.	505	Lv. McLeansboro, Ill	2,951	Lv. 6:40 p.m.
	515	Lv. Dahlgren, Ill	480	Lv. f 6:26 p.m.
6:27 a.m.	530	Lv. Mt. Vernon, Ill	15,500	Lv. 6:05 p.m.
N 6:52 a.m.	546	Lv. Ashley, Ill	662	Lv. 5:40 p.m.
f 7:05 a.m.	557	Lv. Nashville, Ill	2,805	Lv. 5:27 p.m.
7:48 a.m.	592	Lv. Belleville, Ill	30,680	Lv. 4:44 p.m.
8:17 a.m.	606	Lv. East St. Louis, Ill	78,000	Lv. 4:18 p.m.
8:55 a.m. (CST)	609	Ar. St. Louis, Mo	665,000	Lv. 4:00 p.m. (CST)

f - Stops on signal.
B - Stops to leave or take pay passengers.
H - Stops to take or leave pay passengers from or to Nashville and beyond.
N - Stops to leave pay passengers from points south of Evansville and to take pay passengers for East St. Louis and beyond.
R - Stops to take or leave pay passengers to or from points beyond Evansville.
T - Stops to leave or take pay passengers from or to Evansville, St. Louis, or beyond. Train No. 5 also stops at Maunie on Sundays to leave or take pay passengers.
X - To detrain revenue passengers from St. Louis and beyond and to take for Nashville and beyond.
Y - Stops to leave or take revenue passengers from or to Evansville or Nashville and beyond.

* Source: Rand McNally Commercial Atlas and Marketing Guide, 1960, 1969.



C. 25

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3d day of December 1969.

Finance Docket No. 25765

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 3 AND 4 BETWEEN ATLANTA, GA., AND EVANSVILLE, IND., AND TRAINS NOS. 5 AND 10 BETWEEN EVANSVILLE AND ST. LOUIS, MO.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division dated July 30, 1969, a hearing having been held and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Louisville and Nashville Railroad Company be, and it is hereby, required to continue the operations of its trains Nos. 3 and 4 between Atlanta, Ga., and Evansville, Ind., and trains Nos. 5 and 10 between Evansville and St. Louis, Mo., for a period of 6 months from the date hereof;

And it is further ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, division 3.

H. NEIL GARSON,

(SEAL) Secretary.

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SUPREME COURT, U. S. Nos. 410 and 386

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 410

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,
Appellants,

v.

CITY OF CHICAGO, et al.,
Appellees.

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

CITY OF CHICAGO, et al.,
Appellees.

On Appeal From The United States District Court for the Northern District of Illinois.

BRIEF OF THE CHICAGO & EASTERN ILLINOIS RAILROAD IN OPPOSITION TO THE MOTION TO AFFIRM

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
135 South La Salle Street
Chicago, Illinois 60603
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

August 28, 1970

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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BRIEF OF THE CHICAGO & EASTERN ILLINOIS RAILROAD IN OPPOSITION TO THE MOTION TO AFFIRM

Appellant, Chicago & Eastern Illinois Railroad Company ("C&EI"), submits this brief in opposition to the motion to affirm filed by appellees.

The Railroad Is Entitled To Defend The Commission Order Authorizing Discontinuance Of Trains 93 And 54.

Appellees, in two footnotes (Motion to Affirm, pp. 2, 11), challenge the C&EI's right to participate in this proceeding on the ground that the Chicago-Evansville line was sold to the Louisville & Nashville Railroad ("L&N") on June 5, 1969. This argument is without merit.

Appellees do not dispute the fact that the trains at issue on this appeal were operated by the C&EI between Chicago, Illinois and Evansville, Indiana until their discontinuance, pursuant to the Commission Order, on February 2, 1968. Appellees themselves joined the C&EI as a party-defendant when they began the action for judicial review which is now before this Court on appeal. Appellees never made any motion in the District Court to dismiss C&EI as a party.

Certainly the railroad, having secured an order of the Commission favorable to its position, has continued standing to defend that order throughout any proceedings for judicial review. In any event, even if it were conceded that all interest in the subject matter of the litigation had been transferred from the C&EI to the L&N, C&EI would nevertheless properly maintain this action under Rule 25(c) of the Federal Rules of Civil Procedure.

Appellees' Motion To Affirm Itself Demonstrates That The Questions Presented For Review Are Substantial.

While appellees' motion to affirm asserts, in purported compliance with this Court's Rules, that the questions presented for review are insubstantial, the admissions necessarily made in the motion itself demonstrate that the issues deserve this Court's plenary consideration.

Thus, appellees concede that the District Court's decision rests upon an interpretation of Section 13(a)(1) of the Interstate Commerce Act (49 U.S.C. §13(a)(1)), which is directly contrary to the interpretation adopted by the Commission. The motion also concedes that there exist only two court decisions on this issue, both of which are now before this Court on appeal (Motion, pp. 7-8). Appellees also seem to agree with appellants that the question of statutory interpretation involved in this appeal has a general importance in train discontinuance cases. These facts alone indicate the desirability of plenary consideration of the appeal by this Court.

Further argument concerning the merits of the issue of statutory construction of Section 13(a)(1) would be inappropriate here. In any event, nothing in the motion to affirm answers the serious defects of the District Court's decision which were discussed in the jurisdictional statement: the District Court's vacation of a Commission Order without a hearing on the merits; that Court's voiding of a Commission Order on grounds of inadequate notice, despite a lack of showing of prejudice; and the Court's complete failure to prescribe standards with respect to notice, to guide future proceedings in this case or proceedings in future discontinuance cases.

Indeed, the lack of any adequate or specific standards regarding notice, either in appellees' argument or in the decision of the District Court, is underscored by the contrast between the position taken by the appellees in the District Court and that indicated in the motion to affirm. In the District Court, appellees argued that notice should have been given on the L&N line between Evansville and Atlanta (Memorandum In Support of Motion for Summary Judgment, pp. 6, 9). In their motion to affirm, however, appellees apparently construe the District Court's decision to require notice not only between Evansville and Atlanta, but also on the "Hummingbird" route between Cincinnati and New Orleans and adopt that decision as correct.

For the reasons stated herein and in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

versus

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., Appellees.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,

versus

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

(See Inside of Cover for List of Attorneys)

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

HARRY R. BEGLEY,
72 West Adams St.,
Suite 1500,
Chicago, Illinois 60603,

JOSEPH L. LENIHAN,
CLIFFORD T. COOMES,
JAMES W. HOELAND,
(Counsel of record on whom service is to be made)
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellant, Louisville and Nashville Railroad Company.

September 2, 1970.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, - *Appellants,*

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - *Appellees.*

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Appellant,*

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Appellant Louisville and Nashville Railroad Company (L&N) files this brief in opposition to appellees' Motion to Affirm, which motion, we submit, fails to establish any lack of substantiality in the questions presented in L&N's Jurisdictional Statement.

Appellees do not attempt to deal specifically with the issues raised in L&N's Jurisdictional Statement. Instead, they seek to commingle the appeals in the *C&EI* case (Nos. 386 and 410) with the appeals in the *L&N* case (Nos. 387 and 396), apparently to create the impression that there is but one issue, the notice issue, before the Court in all four appeals.

This is not so. Although appellees' position on the notice issue is without merit in our opinion, such issue is not, and has never been, involved in the appeals related to the L&N train discontinuances. A brief summary of the proceedings before the Commission in the separate *C&EI* and *L&N* cases will place appellees' Motion to Affirm in its proper perspective and establish the baselessness of their position.

Involved in Nos. 386 and 410 are appeals related to the discontinuance, pursuant to Commission order served January 31, 1968, by C&EI of its trains Nos. 54 and 93 which formerly operated between Chicago, Illinois, and Evansville, Indiana. At Evansville, the C&EI trains connected with L&N trains Nos. 3 and 4, which still operate between Evansville and Atlanta, Georgia. At Nashville, Tennessee, about midway between Evansville and Atlanta, those L&N trains formerly connected with the L&N trains involved in the appeal in Nos. 387 and 396, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. The Commission granted to L&N authority to discontinue those trains on September 6, 1968.[1]

[1]Ensuing litigation caused L&N to continue operation of the trains until January 8, 1969.

Discontinuance of the C&EI trains was accomplished some two months before L&N even attempted to discontinue its trains. Two separate proceedings were conducted by the Commission under the provisions of Section 13a(1) with, of course, separate issues presented and different parties appearing at the hearings held in each case. Neither the C&EI nor the L&N was a party to the other's case.

Appellees attempt to establish that the C&EI case and the L&N case are "interrelated proceedings" (Motion to Affirm, p. 5), but the record before the Commission is contrary to that contention. As the Commission found:

> "L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at Nashville, via intermediate L&N trains Nos. [3 and 4] . . ." *(Louisville & N. R. Co., Discontinuance of Trains,* 333 ICC 720, 726-727).

Thus L&N was operating Nos. 6 and 7 at a great loss ($500,000 annually) before the C&EI trains were discontinued. That loss, coupled with a declining use of the trains which caused the Commission to find:

> "This is plainly a case where there are too many trains for the diminishing needs of the public on this line." *(Id.,* p. 729),

provided a completely rational basis for Commission authorization for L&N to discontinue the trains.

Moreover, contrary to appellees' assertion (Motion to Affirm, p. 4), the Commission did not suggest that the action pending in the court below concerning the C&EI trains had any influence on its decision in the *L&N* case. In response to the contention made by the opponents that L&N be required to continue to operate the trains until the *C&EI* case was decided in the court below, the Commission found:

> "It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find." (*Id.*, pp. 727-728)

Clearly, therefore, L&N was entitled to have the Commission's decision reviewed on its merits, on this and other issues raised in the court below, before that court summarily remanded the *L&N* case to the Commission.

Appellees have attempted to expand the notice issue (involved only in the *C&EI* case) so as to suggest, at least, that notice should have been posted, not only

at the points served by L&N trains Nos. 3 and 4 operating between Evansville and Atlanta, but, presumably, at the points served by L&N trains Nos. 6 and 7 between Cincinnati and New Orleans.

With respect to the notice issue, it should be emphasized that the appellees herein have never contended, either before the Commission or before the court below, that notice should have been posted at any point between Cincinnati and New Orleans served by Nos. 6 and 7. Obviously, any such contention would have been frivolous, since it would have meant that the C&EI, when it elected to discontinue its trains, would have been required to post notice not only at all points served by the C&EI trains, but presumably at all points served by all trains of other railroads which connected directly or indirectly with the C&EI trains beyond the termini of Chicago and Evansville.

Accordingly, since the notice issue was in no way involved in the case involving the L&N trains, the court below was in error in failing to accord L&N review on the merits of the Commission's order.

Appellees also casually attempt to dispose of the failure of the court below to make the necessary findings of fact and conclusions of law by claiming that in a summary judgment proceeding the court need not make such findings (Motion to Affirm, p. 6, footnote 6). There was no motion for summary judgment pending in the court below in the *L&N* case and, indeed, the court below did not grant the motion of plaintiffs below for summary judgment in the *C&EI* case. Therefore, the order of the court below in the *L&N* case failed

completely to meet the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

Appellees would also have this Court believe that the Commission's order in *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965), constituted a Commission mandate to L&N to continue to operate passenger trains between Chicago and the Southeast (Motion to Affirm, p. 11). That proceeding involved rival applications for stock control of C&EI, the two contestants being Missouri Pacific Railroad Company and Illinois Central Railroad Company. In that proceeding L&N asked the Commission, as a condition to approval of either application, that it allow L&N to acquire C&EI's line between Evansville and Chicago. The Commission imposed such a condition, basing its decision on the many public-interest benefits which L&N acquisition would bring about. But nothing in that decision can be construed to indicate that improved passenger service was an "important consideration." Moreover, the record in that case was made the early part of 1962, and since then public use of passenger trains has severely declined.

Thereafter L&N reached agreement for acquisition of the line between Evansville and Chicago and filed appropriate application to acquire it. Such application was approved by the Commission on October 23, 1968, *Louisville & N. R. Co.—Purchase—Chicago & E. I. R. Co.*, 334 I.C.C. 273. Had the Commission regarded passenger service between Chicago and Evansville as important, it would likely have conditioned its

order so as to require L&N to reinstitute passenger service on the line. The Commission did not do so.

In addition, the Commission was fully aware of L&N's request to acquire that line when it authorized C&EI to discontinue trains Nos. 54 and 93, but the Commission did not require C&EI to continue operating those trains until L&N acquired the line.

Thus it is apparent that the Commission did not consider passenger service between Evansville and Chicago to have a significant bearing on its decision authorizing L&N to acquire the line. The court below was in error in deciding summarily that the acquisition of the line did have significance.

Respectfully submitted,

HARRY R. BEGLEY,
72 West Adams St.,
Suite 1500,
Chicago, Illinois 60603,

JOSEPH L. LENIHAN,
CLIFFORD T. COOMES,
JAMES W. HOELAND,
(Counsel of record on whom service is to be made)
908 W. Broadway,
Louisville, Kentucky 40201,

Attorneys for Appellant, Louisville and Nashville Railroad Company.

September 2, 1970.

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Nos. 386, 387, 396 and 410

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*
v.
CITY OF CHICAGO, et al., *Appellees*.

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellant*,
v.
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 410

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,
v.
CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

(Names of counsel appear inside front cover)

November, 1970

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Of Counsel:

MATHIAS M. MATTERN
511 City Hall Building
Chicago, Ill. 60602

J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61832

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

ANTHONY HASWELL
2517 N. Burling
Chicago, Ill. 60614

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, Jr.
801 Busseron Street
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Building
Henderson, Ky.

WILLIAM F. BLACK
CARL L. EVANS
State Office Building
Montgomery, Ala. 36102

CARL E. VanDORN
807 State Office Building
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg. - Rm. 1105
Jackson, Miss. 39201

SHELDON A. TAFT
GERALD P. WADKOWSKI
111 N. High Street
Columbus, Ohio 43215

RICHARD L. CURRY
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
Cordell Hull Building
Nashville, Tenn. 37219

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Building
Nashville, Tenn. 37201

EDWARD J. HICKEY, Jr.
WILLIAM J. HICKEY
620 Tower Building
Washington, D.C. 20005

ARTHUR K. BOLTON
HAROLD N. HILL, Jr.
JOHN W. HINCHEY
132 State Judicial Building
Atlanta, Ga. 30334

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La. 70112

CHESTER L. RIGSBY
State Office Building
Frankfort, Ky. 40601

LEON M. DESPRES
77 W. Washington
Chicago, Ill. 60602

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036

Attorneys for Appellees

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

Appellees petition that rehearing be granted for the judgment entered October 19, 1970, which summarily reversed the decision of a three-judge district court.

Subsequent to entry of the judgment below, a different three-judge panel in the same district decided *City of Chicago v. United States*, 314 F. Supp. 866, which has been appealed to this court in Nos. 789, 793, 794 and 797. Although the questions are not identical, the subject matter in the eight appeals does have some relationship.

We point out that the meaning of "train" for the purposes of the statute involved does not appear to have been consistently defined or applied by the agency,[1] if indeed the concept of "train" has any bearing upon the agency action in some situations.[2]

It is suggested that rehearing be granted, with briefs and argument, in light of the more recent appeals. *Pickett v. Union Terminal Company*, 313 U.S. 591, 314 U.S. 704, 315 U.S. 386, 394; *Forgett v. United States*, 383 U.S. 926, 390 U.S. 203.

Respectfully submitted,

RICHARD L. CURRY
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Building
Chicago, Ill. 60602

EUGENE W. WARD
Cordell Hull Building
Nashville, Tenn. 37219

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Building
Nashville, Tenn. 37201

EDWARD J. HICKEY, Jr.
WILLIAM J. HICKEY
620 Tower Building
Washington, D.C. 20005

ARTHUR K. BOLTON
HAROLD N. HILL, Jr.
JOHN W. HINCHEY
132 State Judicial Building
Atlanta, Ga. 30334

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[1] Cf. *Kansas City S. Ry. Co. and Louisiana & A. Ry. Co. Discon.*, 333 I.C.C. 51, 55-56, 73-75, and cases cited therein.

[2] Cf. *Southern Pac. Co. Discontinuance-Ogden to Oakland*, 333 I.C.C. 525, 527-528.

Of Counsel:

MATHIAS M. MATTERN
511 City Hall Building
Chicago, Ill. 60602

J. KENNETH ATKINS
Cordell Hull Building
Nashville, Tenn. 37219

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61832

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

ANTHONY HASWELL
2517 N. Burling
Chicago, Ill. 60614

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, Jr.
801 Busseron Street
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Building
Henderson, Ky.

WILLIAM F. BLACK
CARL L. EVANS
State Office Building
Montgomery, Ala. 36102

CARL E. VanDORN
807 State Office Building
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg. - Rm. 1105
Jackson, Miss. 39201

SHELDON A. TAFT
GERALD P. WADKOWSKI
111 N. High Street
Columbus, Ohio 43215

WELDON A. COUSINS
737 National Bank of Commerce Bldg.
New Orleans, La. 70112

CHESTER L. RIGSBY
State Office Building
Frankfort, Ky. 40601

LEON M. DESPRES
77 W. Washington
Chicago, Ill. 60602

GORDON P. MacDOUGALL
705 Ring Building
Washington, D.C. 20036

Attorneys for Appellees

November, 1970

CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is presented in good faith and not for delay.

Gordon P. MacDougall

SUPREME COURT OF THE UNITED STATES

Nos. 386, 387, 396, 410.—October Term, 1970

386 United States et al., Appellants, v. City of Chicago et al.

387 United States et al., Appellants, v. Tennessee Public Service Commission et al.

396 Louisville & Nashville Railroad Company, Appellant, v. Tennessee Public Service Commission et al.

410 Chicago & Eastern Illinois Railroad et al., Appellant, v. City of Chicago et al.

On Appeals from the United States District Court for the Northern District of Illinois.

[October 19, 1970]

Per Curiam.

These cases are a sequel to our decision in *City of Chicago* v. *United States*, 396 U. S. 162, last Term. The Chicago & Eastern Illinois Railroad (C&EI) filed a notice under § 13a(1) of the Interstate Commerce Act, 49 U. S. C. § 13a(1), proposing to discontinue a pair of trains known as the "Georgian," operated by it between Chicago, Illinois, and Evansville, Indiana, and operated in conjunction with trains of the Louisville & Nashville Railroad (L&N) between Evansville, Indiana, and Atlanta, Georgia, crossing Kentucky and Tennessee en route. Part of this litigation grows out of the ICC's approval of the C&EI's discontinuance of the Chicago-Evansville segment of the "Georgian," evidenced by its termination of its investigation.

The L&N also operates the "Hummingbird" between Cincinnati, Ohio, and New Orleans, Louisiana. The "Hummingbird" connects with the "Georgian" at Nashville, Tennessee, where coaches and sleepers are transferred between the two trains. Following the ICC's approval of C&EI's discontinuance, the L&N served notice of discontinuance of the "Hummingbird" [1] which the ICC also approved.

In *City of Chicago* v. *United States, supra,* we held that ICC decisions to discontinue such an investigation were reviewable and remanded the cases back to the District Court. That court then ordered consolidation and remanded back to the ICC for further hearings, holding that the notice served by the C&EI on the governors of Illinois and Indiana and at every station along the Chicago-Evansville run was inadequate because the people of Kentucky, Tennessee, and Georgia, and the governors of those States were not notified. The "Hummingbird" discontinuance was also remanded to the ICC because of its close relationship with the "Georgian." These appeals followed.

We note jurisdiction and reverse. Section 13a (1) provides:

> "A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change . . . of the operation or service of any train . . . are subject to any provision of the constitution or statutes of any State . . . shall mail to the Governor of each State in which such train . . . operated, and post in every station, depot or other facility served thereby, notice . . . of any such proposed discontinuance or change."

---

[1] No issue as to the adequacy of the notice given in the L&N proceeding is raised here.

This section, as we read it, required C&EI to give notice in Illinois and Indiana, the only States in which the line now in controversy has operated. No provision is made in § 13a (1) for notice to States served by connecting railroads which might be affected by a discontinuance.

The dissent finds ambiguity in the phrase "such train" in § 13a (1). It is argued that two interpretations of "such train" are possible: either the train of the C&EI between Chicago and Evansville or the "Georgian" between Chicago and Atlanta. By allowing discontinuance under § 13a (1), however, the ICC must have interpreted "such train" to refer to a train operated by one railroad only; and it was only the Chicago-Evansville discontinuance that was before it at the time. The Commission ruled that "Copies of the notice were duly received and posted in the manner required by Section 13a (1) and our rule and regulations thereunder." [2] 331 ICC 447, 448. We defer on this issue to the definition of "train" given by the administrative agency which has oversight over the problem. See, *e. g., Udall* v. *Tallman*, 380 U. S. 1, 16–17; *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 417–418.

It is true that the C&EI and the L&N functioned in close harmony. Discontinuance of service on one line might have a substantial effect on the other. But this relationship is not unique in railroading. Congress is not unaware of the mutual interdependence of railroads. It designed a federal regulatory system that displaced a state regulatory system when the state system could defeat a carrier's attempt to discontinue a train. Hence we think it distorts § 13a(1) to treat it so as to require

[2] The regulation at the time provided (49 CFR Pt. 43, § 43.5 (j)) that "A certificate that a copy of the notice * * * has been mailed to the Governor and railroad regulatory body of each State in which the subject train or ferry is operated."

the giving of notice to States which had no regulatory power over the carrier.

Accordingly, the decisions in Nos. 386 and 410 are reversed. Since Nos. 387 and 396 were remanded to the Commission solely because of their relation to Nos. 386 and 410, those decisions are also reversed. The causes are remanded to the District Court for review of any questions on the merits which may remain unresolved.

It is so ordered.

MR. JUSTICE HARLAN, with whom MR. JUSTICE BLACK joins, dissenting.

I think these cases do not lend themselves to summary disposition.

The Chicago and Eastern Illinois Railroad Co. and the Louisville & Nashville Railroad Co. jointly operated

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Until 1958 railroad discontinuances required approval of the appropriate regulatory agency in each of the States in which the line operated. Congress knew of the financial difficulties of the railroads and concluded that the problem of discontinuance had to be removed from its parochial setting where state agencies too often required the "maintenance of uneconomic and unnecessary services and facilities." S. Rep. No. 1647, 85th Cong., 2d Sess., 21–22. Therefore, Congress vested power over discontinuances in a body aware of the national transportation problems and needs. See generally, *City of Chicago* v. *United States*, 396 U. S. 162, and *Southern Railway Co.* v. *North Carolina*, 376 U. S. 93.

The problem of discontinuance of services as put to the Congress by the Association of American Railroads was described as follows: ". . . such matters are subject to approval of State regulatory commissions and authority for such discontinuances or abandonments must be obtained within the scope of statutes or procedures under which those State Commissions operate." Problems of the Railroads, Hearings Subcommittee on Surface Transportation, S. Committee on Interstate and Foreign Commerce, Pt. I, Jan. 13, 1958, p. 25.

The legislation was responsive to that need and may not be easily construed to do more than track the jurisdiction of a State over the carrier in question.

a train known as the "Georgian" which provided passenger service between Chicago, Illinois, and Atlanta, Georgia. At Evansville, Indiana, between the two terminal points on the "Georgian" run, the railroad companies switched engines and train crews; passengers, however, could remain in the railroad cars and continue through to the end of the run. The Chicago and Eastern Illinois sought ICC approval of its discontinuance of the Chicago-Evansville portion of the run; notice of the proposed discontinuance proceedings was not served on the Governors and residents of the States served by the Evansville-Atlanta portion of the "Georgian" run. After our remand in *City of Chicago* v. *United States*, 396 U. S. 162 (1969), the District Court held that notice of the I. C. C. discontinuance proceedings should have been given to the Governors and residents of all the States served by the "Georgian" run. The Court, in Nos. 386 and 410, now summarily reverses that decision, holding that § 13a (1) of the Interstate Commerce Act, 49 U. S. C. § 13a (1), only requires that a carrier seeking to discontinue passenger service give notice in those States having regulatory authority over the carrier.[4]

[4] Nos. 387 and 396 are appeals by the Government, the I. C. C., and the Louisville & Nashville Railroad Company challenging the District Court's holding that the issues involving the discontinuance of the Louisville & Nashville Railroad Company's "Hummingbird" train are so factually related to the discontinuance of the "Georgian" run that the "Hummingbird" discontinuance should be remanded in light of the projected reconsideration of the "Georgian" discontinuance. In addition, the Louisville & Nashville Railroad Company, in No. 396, challenges the District Court's action in reinstating the September 6, 1968, restraining order entered by Judge Robson; that restraining order prohibited discontinuance of the "Hummingbird" trains pending resolution of the case in the District Court. On April 3, 1970, this Court stayed the District Court's action in reinstating the earlier restraining order. 397 U. S., at 1019. The effect of today's opinion on the status of that restraining order is unclear.

The issue, in my opinion, is not one justifying summary resolution, as an examination of the Court's opinion indicates. The Court relies in the first instance on the absence of an explicit provision in § 13a (1) of the Act for notice to States served by "connecting railroads." However, the statutory provision in question is manifestly highly ambiguous with regard to the scope of the notice obligation in situations where two carriers, though subject to different state regulatory authorities, offer their services to the public in a manner which, from the consumer standpoint, is indistinguishable from passenger service offered by a single carrier. Section 13a (1) provides in relevant part:

> "A carrier or carriers . . . if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train . . . operating from a point in one State to a point in any other State . . . are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each state in which such train . . . is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. . . ."

Appellants in Nos. 386 and 410 argue that since § 13a (1) accords carriers a right to commence discontinuance proceedings before the I. C. C. if their rights with respect to the operation of train service are subject to any state regulatory authority, the scope of the notice requirement should be limited by the reach of the state regulatory power giving rise, in the first instance, to the carrier's right to go before the I. C. C. Appellees in

Nos. 386 and 410, for their part, contend that the notice requirement is geared to the areas through which "such train" is operated, not merely the areas reached by a State's regulatory power over the carrier. For my part, I find the language and structure of the statutory provision singularly opaque; and I am not aided in my choice between these competing constructions by the Court's observation that § 13a (1) makes no provision for notice served by "connecting railroads."

In view of the structural and linguistic ambiguity of the statutory provision, the Court's reliance on the absence of an explicit reference to carrier arrangements of this sort would carry weight only if the legislative policy underlying § 13a (1) of the Act solidly supported the result reached today. Lacking that, the description of congressional policy in n. 2 of the Court's opinion, *ante*, at ——, hardly warrants the Court's inference in the text of its opinion that the statutory purpose underpinning § 13a (1) is served by a limitation of the notice requirement according to the reach of the State's regulatory power over the carrier filing with the I. C. C.[*] Indeed, the concern with state regulatory parochialism, and the resulting burden on interstate commerce caused

[*] The disconnected nature of the Court's reasoning is nicely illustrated in n. 2 of its opinion, *ante*, at ——. We are offered two quotations—one from the Senate Report and the other from the Association of American Railroads—as legislative history supporting the Court's construction of § 13a (1). The substance of both clearly supports the view of § 13a (1) as seeking to remedy state regulatory parochialism. Unfortunately, neither quotation speaks to the question put in issue by the Court's rationale for summarily disposing of these cases: *i. e.*, whether the congressional decision to proffer an alternative national forum as a remedy for state parochialism is to be construed solely in light of the carrier interest in escaping state regulatory agencies. Yet the Court, after reciting these quotations, chooses to draw the inference that the statute cannot be easily construed to do more than serve that interest of the carriers. I must respectfully submit that this is a rather obvious *non sequitur*.

by economically wasteful passenger service arrangements, argue with at least equal force for an interpretation of the notice requirements of § 13a (1) as reaching beyond the relatively narrow parochial interests likely to be called forth by only a particular State's participation in a hearing on the discontinuance of multicarrier service.

Apparently, the Court recognizes the inherent ambiguity of the statute. Thus its opinion finally comes to rest on the principle of deference to the administrative agency's construction of the statute. Suffice it to say that I am not persuaded by the deference argument as applied to the agency's *pro forma* finding of adequate notice in this very litigation where the notice issue evidently was not before the agency at the time of its ruling. See 337 I. C. C. 447, 448.

The above considerations are not meant to reflect any conclusions concerning the merits of the statutory construction issue presented in these cases. To the contrary, my point is simply that, without briefs and oral argument by the parties on the merits of the question, I would refrain from choosing between the conflicting constructions of § 13a (1) pressed upon the Court by the parties. Therefore, I would note probable jurisdiction in Nos. 386 and 410. I would withhold action in No. 387 pending dispositions in Nos. 386 and 410. In No. 396, I would note probable jurisdiction, limited to the questions concerning the District Court's action in reinstating the restraining order of September 6, 1968.